No. 356 etc.

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JAMES H. McKENNEY,

Brf. of Taylor & Stone for Stone Auditor

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Nos. 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, and Nos. 404, 405, 406, 407, 408, 409, 634, 635.

Filed Feb. 1, 1899.

SAMUEL H. STONE, AUDITOR, ET AL., . . . APPELLANTS,

VERSUS

BANK OF KENTUCKY, ... APPELLEE.

AND SEVENTEEN OTHER BANK TAX CASES.

Appeals from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR SAMUEL H. STONE, Auditor, et al., AND THE CITY OF LOUISVILLE.

WILLIAM S. TAYLOR, ATTORNEY GENERAL,
For Samuel H. Stone, Auditor, et al.

HENRY LANE STONE, CITY ATTORNEY,
For City of Louisville.

THE BRADLEY & GILBERT COMPANY, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 356.
BANK OF KENTUCKY ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 357.
BANK OF KENTUCKY ..... Appellee.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 358.
BANK OF LOUISVILLE ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 359.
BANK OF LOUISVILLE ..... Appellee.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 360.
LOUISVILLE BANKING COMPANY ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 361.
LOUISVILLE BANKING COMPANY ..... Appellee.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 362.
BANK OF COMMERCE ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 363.
BANK OF COMMERCE ..... Appellee.

CITY OF LOUISVILLE.....Appellant,
vs. No. 364.
THIRD NATIONAL BANK.....Appellee.

CITY OF LOUISVILLE.....Appellant,
vs. No. 365.
CITIZENS NATIONAL BANK .....Appellee.

THIRD NATIONAL BANK.....Appellant,
vs. No. 404.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

CITIZENS NATIONAL BANK .....Appellant,
vs. No. 405.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

FIDELITY TRUST AND SAFETY VAULT CO., Appellant,
vs. No. 406.
CITY OF LOUISVILLE.....Appellee.

FIDELITY TRUST AND SAFETY VAULT CO., Appellant,
vs. No. 407.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

LOUISVILLE TRUST COMPANY.....Appellant,
vs. No. 408.
CITY OF LOUISVILLE.....Appellee.

LOUISVILLE TRUST COMPANY.....Appellant,
vs. No. 409.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

FIRST NATIONAL BANK.....Appellant,
vs. No. 634.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

FIRST NATIONAL BANK.....Appellant,
vs. No. 635.
CITY OF LOUISVILLE.....Appellee.

BRIEF FOR THE CITY OF LOUISVILLE, AND SAMUEL H. STONE, Auditor, et al.

STATEMENT.

These eighteen cases, which have been ordered to be heard together, were commenced by the above named banks and trust companies, with others which have not been appealed to this court, April 17, 1897, in the Circuit Court of the United States for the District of Kentucky. The City of Louisville, in which said institutions are located, is an appellant in the first ten, and an appellee in the last eight cases, in the order above stated.

The object of each of said actions brought against the City of Louisville alone was to enjoin said city from collecting ad valorem taxes for the years 1893 and 1894, on the assessments of the franchise of the complainant made and certified by the State Board of Valuation and Assessment, as required by the general revenue act of November 11, 1892; and the object of each of the actions brought against Samuel H. Stone, Auditor, George W. Long, Treasurer, and Charles Finley, Secretary of State, constituting said board, and the City of Louisville, was to enjoin the said board from making or certifying under said act for ad valorem taxation by the State and city any assessment of the franchise of the complainant for the years 1895, 1896, 1897, and 1898, or any subsequent year during its corporate existence.

In each of the bills filed in these actions, the complainant institution alleges it has, by virtue of its acceptance and compliance with the provisions of the revenue act of May 17, 1886, commonly called the "Hewitt Act," an irrevocable or irrepealable contract with the State, by the terms of which, upon the payment of State taxes as therein provided, it is entitled to exemption, during its corporate existence, from the payment of municipal taxes, except on its real estate or building owned and used by it for conducting its business.

The decision of the Court of Appeals of Kentucky of June 1, 1895, in certain Bank Tax Cases (97 *Ky.*, 590), was relied on by the complainant institutions to sustain this contention.

In the cases brought by the appellees, Bank of Kentucky, Louisville Banking Company, and Third National Bank, they pleaded as *res judicata* on the question of their alleged tax exemption, the judgment obtained in suits instituted by said banks respectively in 1894, in the Circuit Court of Jefferson County, State of Kentucky, against the Judge of the Police Court of the City of Louisville, prohibiting the said court from proceeding further in the prosecution of warrants issued therein for the recovery of a fine against said three banks for carrying on the business of banking in said city without having paid to the Commissioners of the Sinking Fund of said city, a license tax of four per cent. on their gross earnings imposed by an ordinance of said city, approved January 29, 1894. The judg-

ment of the Jefferson Circuit Court in the suit brought by the Bank of Kentucky overruled the defendant's demurrer to the petition, and prohibited said Police Court from proceeding further in the prosecution mentioned, which, on appeal, was affirmed by the Court of Appeals, being one of the bank tax cases, *supra*, decided by that court June 1, 1895.

In the suits brought by the Louisville Banking Company and Third National Bank, the Jefferson Circuit Court sustained the defendant's demurrer to the petition, and dismissed the same in each case, but on appeal said judgments were reversed by the Court of Appeals, being two more of the bank tax cases, *supra*, decided June 1, 1895, and in pursuance of the mandate of that court, judgments were subsequently entered in said circuit court, like that in the case of the Bank of Kentucky, prohibiting further proceedings in the prosecution of the warrants issued against the said two banks. (*See these judgments, Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 88–89; *Record, No.* 360, *Stone, et al.*, v. *Louisville Banking Company*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57.)

In each of these prohibition suits, the grounds for the relief sought were (1) that the plaintiff bank had an irrepealable contract with the State to pay taxes, as provided in the Hewitt Act; and (2) that so much of the "Act for the government of cities of the first-class," approved July 1, 1893, as gave the city of Louisville the power by ordinance to collect a license tax from banks, and the license ordinance of January 29, 1894, passed in pursuance of the latter act, impaired the obligation of the plaintiff bank's alleged contract, and were "both unconstitutional and void."

The other six institutions that are parties to these appeals claimed to be privies to the three banks which brought the prohibition suits mentioned by virtue of an alleged agreement with the Commissioners of the Sinking Fund, and their attorney (who was at the time also City Attorney of the City of Louisville), and likwise pleaded as *res judicata*, on the question of their alleged tax exemption, the judgments rendered in said prohibition suits; that is to say, the Bank of Louisville, under said alleged agreement, claimed to be privy to the Bank of Kentucky; the Bank of Commerce, Fidelity Trust and Safety Vault Company, and Louisville Trust Company claimed to be privy to the Louisville Banking Company; and the Citizens National Bank and the First National Bank claimed to be privy to the Third National Bank in the judgments aforesaid.

In denying in its answer the claim of each of the institutions that are parties to these appeals to an irrepealable contract with the State to pay taxes only as provided in the Hewitt Act, the city of Louisville relied on the decision of the Court of Appeals of March 24, 1897, in other bank tax cases, holding that the Hewitt Act was repealed by the general revenue act of November 11, 1892, and all of the banks in the State were subject alike to municipal taxation. (39 *S. W. Rep.*, 1030; *S. C.* 19 *Ky. Law Rep.*, 248.)

With respect to the plea of *res judicata* made by the three banks that brought said prohibition suits, the City of Louisville and Samuel H. Stone, Auditor, et al., contended (1) that the parties to those suits

were not the same as the parties to these; (2) that said city was not made a party defendant to the petitions of said banks in the Circuit Court of Jefferson County, and that it was made a party to the appeals without authority of law; and (3), that the only thing adjudged in said suits was the non-liability of said three banks to pay a license tax to the Commissioners of the Sinking Fund of the City of Louisville, a separate and distinct corporation from said city, on their occupation or business, under the act of July 1, 1893, and the ordinance of January 29, 1894; and that the question of their liability to pay ad valorem taxes to the State and City of Louisville on their franchises, or property, tangible or intangible, under the general revenue act of November 11, 1892, was neither involved in the subject-matter of said actions, nor decided by the court in said judgments.

As to the contention of the other six institutions or parties to these appeals, that they were privies to the three banks, as above stated, in said prohibition suits by agreement and entitled to claim the benefit of the alleged estoppel of the judgments therein rendered, the City of Louisville, in its answer, denied that the alleged agreement between the counsel of said banks and trust companies on the one side, and the Commissioners of the Sinking Fund of the City of Louisville, and their employed attorney (who was also City Attorney), on the other side, was of any legal force or effect on either party; and insisted that so far as said City Attorney undertook to represent the City of Louisville in making said agreement, he acted without authority of law, and that said alleged agreement was not the act and deed of the City of Louisville.

The Bank of Kentucky and Bank of Louisville were originally organized under charters granted by the legislature prior to the act of February 14, 1856, reserving power to amend or repeal charters of corporations and amendments thereof. Under their original charters, and amendments thereto, enacted prior to said reservation act, the legislature imposed for State purposes, a tax of fifty cents on each share of stock of the par value of one hundred dollars in each of said two banks "in full of all tax or bonus." Their original corporate existence extended beyond February 14, 1856, the date of said reservation act; and, after the passage of that act, the legislature amended the charter of the Bank of Kentucky, February 1, 1872, so as to extend its corporate existence until October 1, 1909; and likewise amended the charter of the Bank of Louisville, May 1, 1880, so that its corporate existence was extended until January 1, 1903.

The question as to whether the effect of these charter extensions was to place said old banks on the same footing under the tax laws of the State with the new banks, chartered and organized after February 14, 1856, had not been determined by the Court of Appeals when the Hewitt Act was passed, May 17, 1886. The latter act imposed a tax for State purposes on all banks then doing business in the State, which should, in the manner and within the time provided therein, accept its provisions before the next session of the legislature, which convened December 30, 1887, of seventy-five cents on each share of their capital stock of the par value of one hundred

dollars; and, in addition, on their surplus in excess of ten per cent. of their capital stock, the same rate of taxation assessed upon real estate; but, by the terms of a proviso, nothing in said act was to be construed as exempting from taxation for county or municipal purposes the real estate or building owned and used by said banks in conducting their business. It was further provided in said act if any bank, State or National, should refuse or fail to pay the tax imposed thereby, or should fail or refuse to make the consent and agreement prescribed therein, the shares of such bank and its surplus, undivided accumulations, and undivided profits, should be assessed as directed by said act, and the same taxes, State, county, and municipal, should be imposed, levied, and collected thereon as was imposed on the assessed taxable property in the hands of individuals. With the exception of certain specified acts (having no bearing on the questions involved in these cases) all other acts, general or special, or parts of acts inconsistent or not in conformity therewith, were by said Hewitt Act expressly repealed. (*Session Acts* 1885–6, *volume* 1, *pp.* 144–147; *Ib.*, 201.)

After the passage of the Hewitt Act, the Court of Appeals decided, June 5, 1888, that the amendments enacted after February 14, 1856, to the charters of the old banks granting them extensions of their corporate existence, did not come within the purview of the reservation act referred to. (*Franklin County Court, &c.*, v. *Deposit Bank of Frankfort, &c.*, 87 *Ky.*, 370.) This opinion, however, and that of June 1, 1895, above mentioned (97 *Ky.*, 590), were both expressly overruled by the Court of Appeals in the Bank Tax Cases, decided March 24, 1897. (39 *S. W. Rep.*, 1030; *S. C.* 19 *Ky. Law Rep.*, 248.)

This last decision is not mentioned in the bills of the complainants, but is expressly pleaded and relied on in the several answers of the City of Louisville, as being the last and true construction of the Hewitt Act, and the nature and extent of the alleged contract with the banks that accepted its provisions. This defense of the City of Louisville, as set out in the Bank of Kentucky case, which is substantially the same as that in the other cases, is as follows (*Record*, 356, *Stone, et al.* v. *Bank of Kentucky*, 97–98):

"This defendant, for further answer and defense to complainant's bill, states that the Court of Appeals of Kentucky, on March 24, 1897, in the case of *Deposit Bank of Owensboro* v. *Daviess County*, and other bank tax cases, wherein the same legal questions were involved, and issues were made as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of *Franklin County Court* v. *Deposit Bank of Frankfort*, *Same* v. *Bank of Kentucky*, and other bank tax cases, decided June 5, 1888, reported in 87 *Ky. Rep.*, 370, were expressly overruled; and said court furthermore decided that no bank, State or National, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, and by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all

said banks and similar institutions in the State, were repealed by the State Constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the Legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation, provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State Constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in complainant's bill, and were all subject to amendment or repeal by the legislature."

The decision of March 24, 1897, is now before this court for review on writs of error to the Court of Appeals of Kentucky, the plaintiffs in error being the Owensboro banks.

The national banks that are parties to these appeals in their bills alleged that the revenue act of November 11, 1892, with respect to the taxation of such banks, provided for a tax on their franchises granted under the laws of the United States, and their other intangible property, such as their surplus, undivided profits, and investments, instead of a tax on their shares of stock, and was thus repugnant to the provisions of the act of Congress concerning national banks. This construction of said revenue act was controverted by the answers of the City of Louisville in the cases of the national banks, three of which are parties to these appeals.

In the bills of the Third National Bank it was admitted that its charter life or corporate existence, which it had when it accepted the provisions of the Hewitt Act, expired August 6, 1894, and, under the National Banking Acts, its charter life was extended and renewed for a second period of twenty years from that date. (*Record No.* 364, *City of Louisville* v. *Third National Bank*, 1; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 1.)

In the bills of the Citizens National Bank the like admission is made, the extension and renewal as alleged being from August 8, 1874, for a second period of twenty years. (*Record No.* 365, *City of Louisville* v. *Citizens National Bank*, 1; *Citizens National Bank* v. *Stone, et al.*, 1.)

In the bills of the First National Bank there is no allegation that it accepted the provisions of the Hewitt Act in the manner and within the time therein prescribed, although its charter life had been extended and renewed September 6, 1882, prior to the passage of said

act, for a second period of twenty years; but it does allege that it had paid taxes as provided in the Hewitt Act from July 1, 1887, to the date of the institution of its actions, and that the State had received and appropriated said taxes. "In this way" said bank alleged it had accepted the provisions of the Hewitt Act. (*Record No.* 634, *First National Bank* v. *Stone, et al.*, 3–4; *Record No.* 635, *Same* v. *City of Louisville*, 3–4.)

The records in the cases of the Louisville Banking Company show that its corporate existence will expire January 1, 1899, and they likewise show in the cases of the Bank of Commerce that its corporate existence will expire February 10, 1910.

The Fidelity Trust and Safety Vault Company was chartered by the legislature April 22, 1882; and the Louisville Trust Company was chartered in like manner April 22, 1884. The corporate existence of both of these institutions is unlimited, the charters of each providing that the incorporators shall have 'perpetual succession."

These trust companies in their bills claimed the same tax exemption as the banks under the provisions of the Hewitt Act, the only difference consisting in the fact that the trust companies claimed perpetual exemption, while the banks claimed exemption for the respective periods of their corporate existence as limited by their charters.

The City of Louisville by its answers controverted the allegations of the bills of these trust companies, and denied that either of them was a bank or empowered to do a banking business, and alleged that by the charter of each of said banks it was expressly provided: "Nothing herein shall be construed to permit such company to discount paper, or to engage in the business of banking." (*Record No.* 406, *Fidelity Trust and Safety Vault Co.* v. *City of Louisville*, 17; *Record No.* 408, *Louisville Trust Co.* v. *Same*, 17.)

The City of Louisville, as well as the other defendants, Samuel H. Stone, Auditor, et al., filed demurrers to the bills of all said institutions, and by stipulation with the complainants' counsel, answers were filed at the same time by said city without waiving said demurrers. The grounds of each of these demurrers filed by the City of Louisville and Samuel H. Stone, Auditor, et al., respectively, were as follows:

"1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

"2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant." (*Record No.* 356, *Stone, et al.*, v. *Bank of Kentucky*, 93; *Ib.*, 110.)

Each of the complainants moved the court for a preliminary injunction, and, after oral argument, all of the cases having been heard together, they were submitted May 28, 1897, on said demurrers and motions. (*Ib.*, 100–102.)

The court below, June 4, 1898, filed its several opinions overruling the demurrers to the bills and granting preliminary injunctions in the cases of the Bank of Kentucky, Bank of Louisville, Louisville Banking Company, Bank of Commerce, Third National Bank, and Citizens National Bank, and sustaining the demurrers and dismissing

the bills of the Fidelity Trust and Safety Vault Company, Louisville Trust Company, and First National Bank. Most of these opinions have been copied into the transcripts of the respective records on these appeals, but all of them have been published in 88 Federal Reporter.

The Circuit Court, in the case of the Northern Bank of Kentucky, (which was one of the old State banks, whose charter had been extended after the passage of the reservation act of February 14, 1856), heard with these cases, which has not been appealed to this court, expressly decided these points:

1. That in a suit by a bank to enjoin one county from collecting its tax is under the provisions of the act of November 11, 1892, an adjudication that the bank had an irrevocable contract with the State for exemption from such taxes by reason of its acceptance of the Hewitt Act, is not conclusive, when pleaded as *res judicata* in a subsequent suit involving the right of the State and other counties and municipalities to collect taxes from such bank under the act of November 11, 1892, against either the State or such other counties or municipalities.

2. That the reservation statute of February 14, 1856, applies not only to subsequent grants of original charters, but to extensions of pre-existing charters.

3. That the acceptance of the Hewitt Act by a bank merely created a contract of exemption from other taxation than that therein prescribed, which, by section six of said act, the legislature could revoke at pleasure, and had in fact revoked and repealed by the revenue act of November 11, 1892. (*Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413–427).

The views of the court below in sustaining and upholding the pleas of *res judicata* in behalf of the three banks which were parties to the prohibition suits mentioned, are fully and particularly stated in the Bank of Kentucky case. (*Bank of Kentucky* v. *Stone, et al., Ib.*, 385–398.)

The opinion in the Bank of Commerce case states the grounds on which the lower court sustained the plea of *res judicata* by a bank claiming to be a privy by agrreement to one of the three banks that brought and prosecuted said prohibition suits to judgment. (*Bank of Commerce* v. *City of Louisville, Ib.*, 398–407.)

The reasoning of the Circuit Court in holding that the revenue act of November 11, 1892, with respect to the taxation of national banks, does not violate section 5219 of the Revised Statutes of the United States, is given in the opinion in the First National Bank case. (*First National Bank* v. *Stone, et al., Ib.*, 409–412.)

In the trust company cases, the court below held that a plea that they were privy, by agreement, to the Louisville Banking Company in its said prohibition suit, and that their claim to tax exemption was *res judicata* by the judgment in favor of said bank in that suit, could not be sustained, because the City Attorney had no power to bind the City of Louisville by consenting that the exemption from municipal taxation of the trust companies should depend on the result of

the litigation involving the question of the exemption of a bank, the point adjudged and the point at issue being different.

Upon the question of an irrevocable contract, claimed by the trust companies, on its merits, the Circuit Court reached the same adverse conclusion it did in the case of the Northern Bank of Kentucky, *supra*. (*Louisville Trust Co.* v. *Stone, et al., Ib.*, 407–409.)

After these opinions were delivered, the defendants, Samuel H. Stone, Auditor, et al., stood on their demurrers to the bills, and the issues were made up by the filing of replications to the answers of the City of Louisville. Final decrees were entered June 25, 1898, by the Circuit Court in both cases of the Bank of Kentucky (Nos. 356 and 357); both cases of the Louisville Banking Company (Nos. 360 and 361); and in the case (No. 364) of the Third National Bank *v.* City of Louisville (which latter action involved the taxes of 1893 and 1894), granting in each case perpetual injunctions as prayed for.

At the hearing of each of these five cases, the City of Louisville read a stipulation made with complainants' counsel, together with certain ordinances of said city, the special statutes incorporating the Commissioners of the Sinking Fund, and defining its powers and duties, and a statement of facts bearing on the plea of *res judicata* based on said prohibition suits, all of which are set forth in said stipulation. (*Stipulation, Record No.* 356, *Bank of Kentucky* v. *Stone, et al.*, 163–165.) No other proof was taken or read by the parties at the hearing of the five cases referred to, except the copies of records and documentary evidence made exhibits with their pleadings. At the same time (June 25, 1898), the Circuit Court entered final decrees sustaining defendants' demurrers to the bills and dismissing the same in the cases of the Third National Bank and Citizens National Bank (Nos. 404 and 405), in which said banks claimed an exemption from municipal taxes for years subsequent to the expiration of their first period of corporate existence, in August, 1894 (the court holding that the corporate existence, which said two national banks had when they accepted the Hewitt Act, was the contract period of their tax exemption); in the two cases (Nos. 406 and 407) of the Fidelity Trust and Safety Vault Company; in the two cases (Nos. 408 and 409) of the Louisville Trust Company; and in the two cases (Nos. 634 and 635) of the First National Bank.

The two cases of the Bank of Louisville (Nos. 357 and 358); the two cases of the Bank of Commerce (Nos. 362 and 363); and the case of the Citizens National Bank (No. 365), which was against the City of Louisville alone, involving the taxes of 1893 and 1894, were left open for proof on the issues of fact raised by the pleadings as to the alleged agreement under which said three banks claimed they were entitled to the relief prayed for as privies to the banks which had obtained judgments in said prohibition suits. On these issues of fact the complainant banks took the depositions of ex-City Attorney Henry S. Barker and John H. Leathers, cashier of the Louisville Banking Company; and the City of Louisville took the deposition of J. Moss Terry, secretary of the Commissioners of the Sinking Fund. (*Record No.* 362, *Stone et al.* v. *Bank of Commerce*, 42–92.)

While these depositions were taken and filed in the case of Bank

of Commerce v. Stone et al., they were by stipulation between counsel used and read as evidence in all of the five cases last mentioned. The City of Louisville filed exceptions to certain parts of the depositions taken by said complainants, as well as to the exhibits therewith, and the record evidence offered and read at the final hearing. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 93). These exceptions were all overruled by the court below, to which the City of Louisville excepted. (*Ib.*, 41.)

In these five cases of the Bank of Louisville, Bank of Commerce, and Citizens National Bank, the Circuit Court entered final decrees July 14, 1898, granting perpetual injunctions as prayed for.

At this hearing, the City of Louisville, in addition to the deposition of said Terry, and the exhibits therewith, read in evidence a similar stipulation to that filed in the other cases tried on their merits, and the ordinances of the city, statutes and statements of fact therein mentioned. (*Stipulation, Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 95–97.)

This court will observe from what has been stated that the decrees rendered June 25, 1898, in cases Nos. 356, 357, 360, 361 and 364, in favor of the Bank of Kentucky, Louisville Banking Company, and Third National Bank, respectively, were granted solely on the plea of *res judicata*, said three banks having been parties to the record, the plaintiffs in said prohibition suits, in which the judgments relied on were obtained.

The court will further observe that the decrees rendered July 14, 1898, in cases Nos. 358, 359, 362, 363 and 365, in favor of the Bank of Louisville, Bank of Commerce, and Citizens National Bank, respectively, were granted solely on the plea of said three banks that they were privies by agreement to the plaintiff banks in said prohibition suits, and were thereby likewise entitled to the benefit of such former adjudication.

The decree in the case of Bank of Kentucky v. Stone, et al., will illustrate what the Circuit Court adjudged in the first set of decrees, as follows (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 143.):

"And it is now adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and Geo. W. Long be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Jefferson County, or to any officer of the city of Louisville, or to the county clerk of Franklin County, or to any officer of the Board of Councilmen of the city of Frankfort, or the county of Franklin; and the defendants, the City of Louisville, County of Franklin, and board of councilmen of the city of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuation; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

"It is further adjudged, ordered, and decreed, by reason of the sev-

eral pleas of *res judicata* relied on by complainant in its bill, and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky, and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article 2 of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void."

The county of Franklin and city of Frankfort were not parties to the other four cases above mentioned, decided June 25, 1898.

The decree in the case of Bank of Commerce *v.* Stone, et al. will show the character of the second set of decrees, as follows (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 94):

"It is adjudged, ordered, and decreed that the complainant is entitled to the benefit of the proceedings taken in the case of the Louisville Banking Company *vs.* R. H. Thompson, judge, &c., in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the Court of Appeals of Kentucky, wherein the Louisville Banking Company was appellant and the said R. H. Thompson, judge, &c., and the City of Louisville were appellees, to the same extent as if the camplainant had been a party to said proceedings.

"That it is *res adjudicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11, 1892, or certifying the same to the city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the Constitution of the State of Kentucky and any provision of the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, other than as allowed by the said Hewitt law is, during the corporate existance of the complainant,

unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant."

The defendants in the court below filed their assignment of errors and petition for an appeal to this court from each of said decrees, entered June 25 and July 14, 1898. These appeals were allowed and perfected by the execution of appeal bonds, and the issuance and service of citations were waived by complainants' counsel.

SPECIFICATION OF ERRORS.

The errors assigned in the case of the Bank of Kentucky v. Stone et al., and now specified as those relied on by the appellants, City of Louisville and Samuel H. Stone, Auditor, et al., in this court are as follows (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 166–167; *lb.*, 165–6):

"1. The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

"2. The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky, to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Bank of Kentucky, against R. H Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, July 24, 1894, affirmed by the Court of Appeals of Kentucky June 1, 1895, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the Sinking Fund Commissioners of the City of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant city of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the Board of Valuation and Assessment of the State of Kentucky, under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction, enjoining and restraining them from valuing and assessing the franchise on intangible property of complainant, and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897, and 1898, and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act impaired the

obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States."

The same errors in substance were assigned and are specified as those relied on by the appellants, City of Louisville and Samuel H. Stone, Auditor, et al., in the other four cases, decided June 25, 1898, and it is deemed unnecessary to repeat them in this brief, but the court is referred thereto. (*Record No.* 357, *City of Louisville* v. *Bank of Kentucky*, 25–26; *Record No.* 360, *Stone, et al.* v. *Louisville Banking Company*, 51–53; *Ib.*, 51–52; *Record No.* 361, *City of Louisville* v. *Same*, 31–32; *Record No.* 364, *City of Louisville* v. *Third National Bank*, 32–33.)

The errors assigned in the case of the Bank of Commerce *v.* Stone et al., and specified as those relied on by the appellants, City of Louisville and Samuel H. Stone, Auditor, et al., in this court, are as follows (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 97–99.):

"1. The court erred in overruling and not sustaining each ground of their respective demurrers to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against the defendants or either of them.

"2. The court erred in overruling the exceptions of the defendant City of Louisville to the depositions, exhibits, documents and records offered and read in evidence by complainant on the final hearing of this cause.

"3. The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of the Louisville Banking Company against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuauce of the mandate of the Court of Appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Louisville Banking Company in said police court for carrying on the business of banking without paying the license fee to the Sinking Fund Commissioners of the City of Louisville, in violation of the ordinance of the City of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the Board of Valuation and Assessment of the State of Kentucky, under the act of November 11, 1892, on account of the alleged agreement with ex-City Attorney Barker and the Commissioners of the Sinking Fund of the City of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant members of said State board, enjoining and restraining them from valuing

and assessing the franchise or intangible property of complainant, and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897 and 1898, and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act, the city charter and the State Constitution, or either of them, impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated, and was repugnant to, the Constitution of the United States."

The same errors in substance as those last stated were assigned and are specified, as those relied on in this court, by the appellants City of Louisville and Samuel H. Stone, Auditor, et al., in the other four cases decided July 14, 1898, and need not be here repeated, the court being referred thereto. (*Record No.* 358, *Stone, et al.* v. *Bank of Louisville*, 37–38; *Record No.* 359, *City of Louisville* v. *Same*, 31–32; *Record No.* 363, *City of Louisville* v. *Bank of Commerce*, 33–34; *Record No.* 365, *Same* v. *Citizens National Bank*, 33–34.)

BRIEF OF ARGUMENT.

For the City of Louisville and Samuel H. Stone, Auditor, et al., in the ten cases where they are appellants, we shall undertake to maintain the following propositions:

1. The bill in each case fails to state facts sufficient to show jurisdiction in the Circuit Court of the United States.

2. The bill in each case fails to state facts sufficient to give the Circuit Court of the United States jurisdiction in equity, and should have been dismissed for want of equity.

3. None of the judgments pleaded by the complainants estops the State of Kentucky, or appellants, Stone, Auditor, et al., from making assessments of complainants' franchises and collecting State taxes thereon under the act of November 11, 1892.

4. Neither the State nor the City of Louisville, by the judgments of the State court in the prohibition suits, is not estopped to deny that the Bank of Kentucky, Louisville Banking Company, and Third National Bank have an irrepealable contract of exemption from any greater burden of taxation than that provided in the Hewitt Act.

5. The Bank of Louisville, Bank of Commerce, and Citizens National Bank were not privies to the banks that were parties plaintiff in the prohibition suits, and neither the State nor the City of Louisville is not estopped to deny their claim to a like tax exemption.

I.

NO JURSIDICTION SHOWN BY THE BILLS.

The bills on their face disclose facts which show the complainants by their acceptance of the Hewitt Act did not acquire irrepealable contracts with the State to pay taxes only as prescribed in that act during their corporate existence; and which further show that the legislative act of November 11, 1892, did not impair the obligation

of their contracts with the State, because in the Hewitt Act there was an express reservation of the power to repeal that act and to substitute in its place a different scheme of bank taxation. The Circuit Court, on an examination of the bills in considering the demurrers thereto, readily reached the conclusion that the complainants had no irrepealable contract by reason of their acceptance of the Hewitt Act, and that said act was subject to repeal at the will of the legislature, and had been in fact repealed by the revenue act of November 11, 1892. (*Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413.)

The only Federal question suggested in the bills being whether the State Constitution, adopted September 28, 1891, and the act of November 11, 1892, or either of them, impaired the obligation of complainants' contracts acquired by their acceptance of the Hewitt Act, and that question having been determined adversely to the complainants, no jurisdiction remained in the Circuit Court to determine the mere question of evidence, or the effect to be given to certain former judgments of the State court.

It is well settled that the Circuit Court or this court will decide for itself the construction that should be given to the State legislative act under which the contract is claimed, and will not accept as conclusive the construction which the Supreme Court of the State has put upon such act, nor be bound thereby unless such construction of the State court has been so long and firmly established as to become a rule of property. (*Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 *U.S.*, 486; *Shelby Co.* v. *Union & Planters Bank*, 161 *U. S.*, 149.)

The allegation in the bills that the Court of Appeals of Kentucky in the Bank Tax Cases, decided June 1, 1895, held that the banks which had accepted the Hewitt Act acquired contracts with the State which could not be repealed, did not bring these cases within the jurisdiction of the Circuit Court, if the latter court discovered, on an examinationof the Hewitt Act, recited in the bills, and of which it was bound to take judicial notice, that there was an express reservation therein of the power of the legislature to repeal said act at will, and that there was no such contract as claimed. If there was no irrepealable contract, there was no impairment of its obligation by the passage of the repealing act, and if the latter act did not impair the obligation of the contract made between the banks and the State, there was no Federal question left on which the Circuit Court could retain jurisdiction of these cases.

In *Phoenix Fire & Marine Insurance Co.* v. *Tennessee*, 161 *U. S.*, 183, the share holders, as well as said company, were parties to the action and claimed immunity from taxation by the city of Memphis. After this court, from its own construction of the State statute, had reached the conclusion that there was no contract of exemption, the plea of *res judicata*, interposed by the shareholders as a defense to the action, was disposed of as follows:

"Concluding, as we have, that this plaintiff in error insurance company is not exempt from taxation by the language of the statutes above mentioned, we come to the consideration of the second defense interposed by its shareholders. It seems that some time in the year 1873 the shareholders, or some of them, were sued by the city of

Memphis to collect from them certain taxes alleged to be due that city for the year 1872 upon the shares of stock held by them. By the decision of the Supreme Court of Tennessee the city recovered a judgment. A stipulation was then entered into between the parties to that suit, which is in the record, by which it appears that the same questions involved in that suit were fully and fairly presented in the case decided in favor of the plaintiffs, at that term of court, wherein the state of Tennessee and Shelby County were complainants, and Napoleon Hill and others, stockholders in the Memphis Fire and General Insurance Company, were defendants, and which action had been carried to the Supreme Court of the United States by writ of error for its decision of the questions, and, therefore, to save the expense of argument in the case, it was agreed by counsel for all parties that the *Memphis City Case* should abide by the decision of *Tennessee* v. *Hill*, which should be conclusive upon the parties to the stipulation in all things the same as though actually rendered in that case. If the decree in the *Hill Case* were affirmed, then this decree was to to be affirmed, and if the other should be reversed, then this was to be reversed. After the signing of that stipulation, the *Hill Case* was duly prosecuted by writ of error and argued before the Supreme Court of the United States, where the judgment in favor of complainant was reversed and the cause remanded to the Supreme Court of Tennessee with directions to enter its decree therein for the defendent Hill. This was done, and, in accordance with the stipulation above mentioned, a decree was thereupon entered in the Memphis city action, reversing the judgment in favor of plaintiff, and adjudging and decreeing that the tax levied and assessed by the city of Memphis upon the defendant's shares of stock was illegal, and adjudging that the city of Memphis could not legally assess said shares of stock for taxation, in the hands of the owners thereof, and that such shares were exempt from any and all municipal taxation, and the city and its officers were perpetually enjoined from collecting or proceeding to collect such taxes. This judgment was entered by consent, and pursuant to the stipulation of the parties entered into at the time the writ of error was sued out in the *Hill Case*, and it is now set up and offered in evidence as an adjudication in favor of the shareholders of the insurance company who are admitted to be the direct successors of the shareholders of the company sued in the former action, and the decision of the State court, refusing the benefit of that adjudication to the shareholders, is claimed to have been error, and to present a Federal question for review by this court. * *

"We think the decision of the Supreme Court as to the weight to be given the judgment is not reviewable by us, because it is not a Federal question. The former judgment determined that, as between the city and the shareholders, the latter were not subject to pay the taxes for the years specified. In the action now under consideration we have determined that there was no immunity conferred either upon the corporation or the stockholders by the statutes cited. On the trial of this action the former judgment was offered in evidence by the shareholders, and it was held to constitute no bar to the maintenance of this action by the plaintiffs, nor did it operate as an

estoppel upon their right to claim taxes for subsequent years. The judgment offered in evidence was the judgment of a State court, and the refusal to accord to it all that was claimed for it in the nature of an estoppel by counsel for plaintiffs in error was, in any event, no more than a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was by the general law entitled to. In no event was it anything other than error committed by the court below in regard to the general law or rule of evidence, which has nothing of a Federal question connected with it. * * *

"There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a State court operated as an estoppel against the plaintiff below, and prevented the State court from granting it the relief to which it would otherwise be entitled. In granting relief it was bound to consider the Federal question *as to whether there was or was not a contract of immunity*, and that question was open to review here, and we have just reviewed it. It is, however, quite doubtful whether the court below committed any error, even if the question were to be regarded as of a Federal nature and open to us for review. (*Keokuk & W. R. Co.* v. *Missouri*, 152 *U. S.*, 301, 314.)

"It is said that a suit for taxes for one year is no bar to a suit for taxes for another year; that it is not the same transaction, and the judgment in a prior action can never operate as an estoppel other than as to those matters which were in issue and controverted, and upon the determination of which a finding or verdict was rendered. It is not necessary in this case, however, to determine whether there was any one particular fact in issue and litigated in the first case, and which would be closed from further controversy, and which, as thus decided, would preclude a recovery in this case. We hold that the question in any event, as presented in this case, was not a Federal one."

Although that case was brought to this court on a writ of error to the Supreme Court of Tennessee, it would appear that the same ruling should apply to a case brought originally in the Circuit Court of the United States, and thence to this court on appeal. Suppose the shareholders in the said insurance company had filed their bill in equity in the Circuit Court of the United States, for the Western District of Tennessee, against the City of Memphis, to enjoin that city from collecting its taxes on their shares of stock on the ground (1) that they had by the charter of said company a contract of immunity from municipal taxes; and (2) that their right to such contract of immunity was *res judicata* by reason of the judgment of the State court relied on as an estoppel in the case last cited, and that this supposed case had been brought to this court on appeal by either party, would not this court, after deciding on the face of the bill that there was no contract of immunity from municipal taxation, further hold that the plea of *res judicata* "had nothing of a Federal question connected with it;" that it was "wholly one of evidence as to whether or not a prior judgment in a State court operated as an estoppel?"

In *New Orleans* v. *New Orleans Water Company*, 142 *U. S.*, 79, this court held that before it can be asked to determine whether the stat-

ute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and that a contract, which is subject to the will of the legislature, could not be impaired by subsequent legislation. In that case it will be observed that the prior judgment of the Supreme Court of Louisiana was relied on as having fixed the rights of the parties to the contract alleged.

In *St. Paul, M. & M. Ry. Co.* v. *St. Paul & N. P. R. R. Co.*, 68 *Fed. Rep.*, 11, Judge Thayer, for the Court of Appeals, in the Eighth Circuit, in reversing the judgment and directing the court below to dismiss the bill, said:

"A case which in fact depends for its decision upon questions of local or general law, can not be brought within the jurisdiction of a Federal tribunal as one arising under the Constitution and laws of the United States merely by referring in the complaint or declaration to some Federal statute or statutes, and by setting up a cla m thereunder, which is merely colorable and obviously without any reasonable foundation. If such a practice was tolerated, the result would be that the jurisdiction of the Federal courts would be unduly enlarged and made to comprehend a class of cases which were never intended to be tried therein."

In *Goldstein* v. *Whelan*, 62 *Fed. Rep.*, 125, the court, by Judge Coxe, said:

"It is probably true that where a Federal question is involved, the court is justified in adjudicating upon all questions growing out of the transaction involved. But is this true where it appears that there is no Federal question? In other words, can the court retain jurisdiction to pass upon a cause of action solely cognizable by the State courts, after it is demonstrated that no Federal question is involved, simply because the bill alleges facts which, if true, would give the Federal court jurisdiction?"

In *New Orleans* v. *Benjamin*, 153 *U. S.*, 411, this court, by Chief Justice Fuller, said:

"Ordinarily a question of the repugnancy of a State statute to the impairment clause of the Constitution is to be passed upon by the State courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require, (*Chic. & A. R. Co. Wiggins Ferry Co.*, 108 *U. S.*, 18), and if there be ground for complaint of their decision the remedy is by writ of error under section 709, Revised Statutes."

By section 5 of the Judiciary Act of March 3, 1875, still in force, it is expressly provided: "That if in any suit commenced in a circuit court * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit."

Of course, this means a dismissal without prejudice.

In *Morris* v. *Gilmer*, 129 *U. S.*, 315, it was held that whether the circuit court had or had not jurisdiction of the case, was a question which this court must examine and determine, even if the parties

forbear to make it or consent that the cause may be considered on its merits, and that it was the duty of the circuit court to dismiss the suit if it appeared any time after it was brought, and before it was finally disposed of, that it did not involve a controversy of which it might take cognizance.

In the case last cited, the jurisdiction depended on the diverse citizenship of the parties. A motion was made in the court below by the defendants to dismiss the action because the complainant was not a resident of Tennessee when he brought suit in the Circuit Court of the United States for the Middle District of Alabama, and the motion was overruled on the proof, and the case went to final decree on the merits. (*Gilmer* v. *Morris*, 35 *Fed. Rep.*, 682). This court held that complainant was not a citizen of Tennessee when his action was commenced, but of Alabama, and having disposed of this jurisdictional fact, declined to proceed further, using this language:

"It is unnecessary to decide whether the Circuit Court erred in overruling the plea of former adjudication, or in rendering the decree appealed from; for we are of opinion that the motion to dismiss the suit, as one not really involving a controversy within its jurisdiction, should have been sustained."

In these cases the bills all allege that the highest court in the State, on June 1, 1895, held that the Hewitt Act was still in force with respect to the banks which had accepted its provisions; and that subsequent legislation had not repealed that act or impaired the obligation of the complainant banks' contracts. It is not alleged that the Court of Appeals had subsequently overruled its former decision, or had applied the operation of the act of November 11, 1892, to the complainants' contracts so as to impair the obligation thereof, nor is it alleged that the rights of either of the complainant banks in these cases, growing out of their plea of *res judicata*, had been adjudicated by the State court, or that the latter court had refused to grant them the protection claimed under the Hewitt Act. The truth is, these cases were brought about three weeks after the decision of the Court of Appeals of March 24, 1897, in the Owensboro Bank Tax Cases, under the apprehension that said court might apply to the complainant banks the operation of the act of November 11, 1892, notwithstanding the former adjudication. In other words, these cases were manifestly brought because the complainant banks were fearful that the Court of Appeals of Kentucky would not give effect to and enforce its own former judgment when pleaded by them as *res judicata*.

It is not alleged in these bills that since the adjudication of June 1, 1895, there had been any *legislative* enactment which operated upon the complainants or impaired the obligation of their contracts.

In *New Orleans* v. *Citizens Bank*, 167 *U. S.*, 371, the judgments of the State court, pleaded as *res judicata*, were rendered March 10, and May 3, 1887, and enjoined the collection of taxes for the years 1886 and 1887, respectively, on the ground that the bank, under its charter, had a contract of exemption from all taxation. The legislative acts, devising a scheme for the assessment and taxation of all banks and their shares of stock—which the Citizens Bank, in the case cited, alleged were an impairment of the obligation of its charter

contract of immunity from all taxation, in violation of the Constitution of the United States—were passed in 1888 and 1890, subsequently to the rendition of said State court judgments, and it was under the latter acts that assessments for taxation for State, parochial, and city purposes were about to be made for the years 1889 to 1892, inclusive, when the suit for an injunction was instituted by said bank in the Circuit Court of the United States. While this court unanimously held in that case that the bank, under the language of its charter and the construction given thereto by the State in all of its taxing departments for forty years, and by the supreme and district courts of the State for twenty years more, had a contract of exemption on the subjects of taxation as defined in the opinion, three members of this court dissented from the opinion rendered on the ground that the judgments relied on by said bank did not sustain the plea of *res judicata*.

The conclusion reached in that case by the whole court was, because, deciding for itself independently, the true interpretation of the language used in the bank's charter entitled it to a contract for immunity from all taxes on certain subjects of taxation, and this opinion was fortified by the previous decisions of the State courts, which had been so long and firmly established as to become a rule of property.

In the case last cited, the Circuit Court and this court were entirely justified in retaining jurisdiction and disposing of said case on its merits, not because of the plea of *res judicata*, but on the ground that the bank in its bill alleged and showed it was "contractually exempt from State and municipal taxation under its charter, and the acts supplementary thereto;" and on examination of the charter amendments referred to in the bill, the Circuit Court (54 *Fed. Rep.*, 73) found this allegation to be true. The Federal question whether or not the State statutes of 1888 and 1890 impaired the obligation of this charter contract was thus directly presented and sustained, and the jurisdiction of the court established.

The jurisdictional facts, as shown by the record in that case, however, are very different from those developed in these cases; besides, the question of jurisdiction in that case, while made by a demurrer to the bill in the lower court, was not pressed in this court on the appeal.

In *Commercial Bank* v. *Buckingham*, 5 *How.* (45 *U. S.*), 317, the question involved was whether a statute of Ohio, enacted in 1824, as construed by the Supreme Court of that State, impaired the obligation of a contract in the bank's charter granted in 1829. By the former act all banks were made liable to pay six per cent. interest on their notes from the date of demand and refusal of payment; and by the subsequent act chartering the bank, it was provided that in case the bank suspended payment and refused to pay its notes or bills, it should be liable to pay, "as additional damages" to the holder, twelve per cent. per annum thereon. The Supreme Court of Ohio had construed the latter act as requiring the bank to pay twelve per cent. in addition to the six per cent. interest provided in the prior act in case of non-payment by a bank of its notes or bills on demand. This court, in dismissing the case for want of jurisdiction, said (*Ib.*, 342–343.):

"It is conceded that the act of 1824 is valid and constitutional, whether it applies to the plaintiff's charter or not; and if so, it follows as a necessary consequence that the question submitted to the court and decided by them was ~~of~~ one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase 'additional damages,' as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the State courts to construe their own statutes, and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their *judgments* have impaired the obligation of contracts. The power delegated to us is for the restraint of *unconstitutional legislation* by the States, and not for alleged errors committed by their *judiciary*."

So, in these cases, the act of November 11, 1892, is admitted and held by the Circuit Court to be constitutional as applied to banks in the State generally, old and new, State and National; and, when enacted and made applicable by the legislature to all banks in the State, that it did not impair the obligation of existing contracts between the State and banks which accepted the Hewitt Act, because such contracts were made on the express condition that they might be altered or repealed at the will of the legislature. But in complainants' bills it is alleged that ~~because~~ the Court of Appeals of Kentucky, June 1, 1895, in deciding the cases of ten particular banks held that said act when applied to the banks which had accepted the Hewitt act, impaired the obligation of their contracts, and thus violated the Constitution of the United States. It is insisted that this fact presents a Federal question, and gave the Circuit Court jurisdiction, and imposed the duty on that court to also declare said act repugnant to the Constitution of the United States, so far as the complainant banks are concerned, although it was entirely convinced that the State, through its legislature, in passing said act of November 11, 1892, had not impaired the obligation of the contract made between the State and any of said banks. In other words, it is claimed that the Circuit Court, as between citizens of the same State, had jurisdiction of these cases, because the Board of Valuation and Assessment and the City of Louisville were about to impair the obligation of complainants' contracts—not that such obligation was impaired by the legislature in enacting the law of November 11, 1892, nor that it had been impaired by any judgment of the State court. On the contrary, these banks in their bills allege the rendition of only one judgment of the highest court in the State, and admit in their bills that that judgment was in their favor.

The Federal court is, therefore, called on by complainants to take jurisdiction in these cases merely for the purpose of enforcing the State court's erroneous judgment of June 1, 1895. Will not this court say to these complainant banks, in the language of the opinion

last cited, "the power delegated to us is for the restraint of unconstitutional *legislation* by the States," not, when we know the law complained of does not violate the Constitution of the United States, to prevent the disregard of a State court's erroneous judgment by the executive officers of such State?

That kind of controversy is within the jurisdiction of the State court alone, and the presumption must be indulged that it will give such force and effect to its own prior judgment as it is entitled to under the law. Had the bills of complainants alleged that the State had, since the State court's judgment of June 1, 1895, taken *legislative* action and passed a law that impaired the obligation of their contracts, arising out of a former adjudication, as in the case of New Orleans *v.* Citizens Bank, *supra*, there might have been some plausible ground on which to uphold the Circuit Court's jurisdiction in these cases.

In all the cases arising under the Constitution or laws of the United States, which we have examined, where this court has sustained the jurisdiction of the Circuit Court, as to questions involved other than Federal questions, it has been on one of these grounds: (1) the Federal law drawn in question was held to be constitutional; or (2) the State statute drawn in question was held to be unconstitutional. In other words, where the Federal question has not been established, this court has not sustained the jurisdiction of the Circuit Court to proceed to the determination of other questions involved in the case. (*Mayor* v. *Nashville*, 5 *Wall.*, 247; *Tennessee* v. *Davis*, 100 *U. S.*, 257; *Railroad Co.* v. *Mississippi*, 102 *U. S.*, 135; *Carey* v. *Railroad Co.*, 150 *U. S.*, 170; *Chappell* v. *United States*, 160 *U. S.*, 499; *Scott* v. *McDonald*, 165 *U. S.*, 58; *Holder* v. *Aultman*, 169 *U. S.*, 81.)

So far our discussion of the question of jurisdiction has been applicable to all of these cases against the City of Louisville, as well as those in which the Auditor, Treasurer, and Secretary of State, constituting the Board of Valuation and Assessment, have been joined as co-defendants. These officers, representing as they do the State of Kentucky, by their demurrers to the bills likewise contested the jurisdiction of the Circuit Court, and claim on these appeals that the actions to which they have been made defendants are, to all intents and purposes, against the State of Kentucky. Although the eleventh amendment to the Constitution of the United States does not in terms prohibit the judicial power of the United States from extending to a suit commenced against a State by one of its own citizens, still this court has decided that a suit in the Circuit Court of the United States by a citizen against his own State, without its consent, will not lie, although a Federal question be involved. (*Hans* v. *Louisiana*, 134 *U. S.*, 1.)

Suits brought like these for relief against State officers are virtually against the State itself. (*Louisiana* v. *Jumel*, 107 *U. S.*, 711; *Hagood* v. *Southern*, 117 *U. S.*, 52; *Ex parte Ayers*, 123 *U. S.*, 443.) The relief asked in these cases is not against the defendants, Stone, Long, and Finley, as individuals, but in their representative capacity as officers of the State of Kentucky. The acts sought to be

enjoined are the assessments of complainants' franchises by the Auditor, Treasurer, and Secretary of State, constituting the Board of Valuation and Assessment for State, as well as city taxes, and the collection by the Auditor of State taxes, as well as by the City of Louisville of city taxes on such assessments. The same assessments answer for both purposes. The prayer in each bill against Stone, et al., in these cases is for a perpetual injunction against said officers, enjoining them from making any assessment of the complainant's capital stock, franchise, or other property, under the act of November 11, 1892, and the Auditor from collecting taxes due the State based on such assessments, and on final hearing a decree is asked establishing the complainant's contract right to be taxed in the method prescribed in the Hewitt Act, and not otherwise. (*See prayers of bills, Record, No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 14–15; *Record, No.* 358, *Same* v. *Bank of Louisville*, 12–13; *Record, No.* 360, *Same* v. *Louisville Banking Company*, 12; *Record, No.* 362, *Same* v. *Bank of Commerce*, 12; *Record, No.* 405, *Citizens National Bank* v. *Stone, et al.*, 12–13; *Record, No.* 407, *Fidelity Trust & Safety Vault Co.* v. *Same*, 12–13; *Record, No.* 409, *Louisville Trust Company* v. *Same*, 12; *Record, No.* 634, *First National Bank* v. *Same*, 9–10.)

These prayers are substantially alike, hence we quote, for example, that in the case of the Louisville Banking Company, as follows:

"To the end, therefore, that your orator may not be subjected to the false claims and suits which will be instituted by the city and *State*, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpoena against the defendants, Samuel H. Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and the city of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said Sameul H. Stone, Charles Finley, and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson County, or any other officer, and that the defendants, including the city of Louisville, and each of them, be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the *State of Kentucky* or the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the 'Hewitt bill,' *and not otherwise*, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or claimed penalties in behalf of either the city or *State*; and for all general and equitable relief to which your orator may be entitled."

So the final decrees, already quoted by us in the statement of these cases, where Stone, et al., are defendants, awarded to the complainants therein the exact relief prayed for *against the State*, as well as the city of Louisville. In other words, the Circuit Court decreed that by reason of the plea of *res judicata*, and the complainant's acceptance of the Hewitt Act, "the complainant has an established contract with the Commonwealth of Kentucky * * the terms of which contract the *Commonwealth of Kentucky* can not alter or change without the consent of the complainant; that by the terms of this contract, the complainant and its shares of stock, can not, during its corporate existence, be assessed for taxation for *State purposes* in a different mode or at a greater rate of taxation than as prescribed in said act." (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 143).

In none of the bills is the judgment in any action to which the State was a party, or in which its taxes were involved, pleaded as *res judicata*. No such judgment had ever been obtained by either of the institutions that are parties to these appeals. The following allegations in the bills of the Louisville Banking Company, which are the same in substance as those in the other bills, show conclusively these suits are really against the State itself, and seek (1) to conclude its rights by the judgments in the prohibition suits; and (2) to perpetually enjoin it by its officers from making any assessments of the complainant's franchise, and from collecting its taxes, interest, and penalties thereon, under the act of November 11, 1892:

"In the Court of Appeals, which is the court of final resort in the State of Kentucky, the City of Louisville was represented by its corporation counsel *and the Commonwealth of Kentucky appeared by its attorney general*, and by oral argument and printed brief opposed the contention of the several banks. The city *and the State*, through their respective official attorneys, both insisted that none of the banks or trust companies had any contract under the 'Hewitt bill.'" (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Co.*, 8.)

"Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and cost." (*Ib.*, 11.)

Could a cause of action be stated more aptly or clearly in a suit instituted directly against the State? Why allege that the amount of the *State* taxes against the complainant, based on the assessment of its franchise, "exceeds two thousand dollars, exclusive of interest and costs," unless the object was to show that the Circuit Court had jurisdiction of the action as against the State itself by reason of the amount in controversy?

In this connection, we call the court's attention to the fact that in the bill of the appellee, Bank of Commerce, against Stone, et al., and that of the appellee, Louisville Banking Company, against the same defendants, the allegations as to the amount in controversy are not sufficient to bring these two cases within the jurisdiction of the Circuit Court. In the former case the bill alleges:

"As applied to your orator the tax under the act of November 11, 1892, before referred to, will exceed the tax which it would have

to pay under the Hewitt bill by $20,000." (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 5.)

Again, the bill in that case alleges:

"Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000, exclusive of interest and cost, and the taxes claimed by the City of Louisville, based on the assessment of your orator's franchise, exceeds the sum of $2,000, exclusive of interest and cost". (*Ib.*, 11.)

These are all the allegations of the complainant in that case with respect to the amount in controversy. The tax rate levied by the State or by the City of Louisville for either of the years 1895–6–7–8 is not stated. No assessment of said complainant's franchise was made by the Board of Valuation and Assessment for either of said years, the taxes for which alone are in controversy. The amount of such assessments, therefore, was not stated. The value of the complainant's franchise in either of said years is not alleged, or that it was as much as it was in 1893 or 1894, when the same was assessed by said board. What are we then to understand by the allegations quoted above? Simply that during the corporate existence of said bank, not during said four years merely, the taxes of the State and of the city, respectively, will exceed $2,000, exclusive of interest and cost. But this court has recently expressly held, in a similar case, such allegations were insufficient to give the Circuit Court jurisdiction.

In *Citizens Bank* v. *Cannon*, 164 *U. S.*, 319, the bill alleged that the defendants, who were sheriffs, respectively, of a number of parishes of Louisiana, were about to assess and collect State and parish taxes for the years 1889 to 1892, inclusive, but did not contain a specific allegation as to the amount of the assessment or taxes for any one parish, but averred that the taxes so assessed exceeded, exclusive of interest and costs, the sum of $2,000. This was construed to refer to the taxes during the charter life of the bank. On this point the court held that the facts showing jurisdiction did not affirmatively appear in the bill, and observed (*Ib.*, 322):

"The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and if the amount of such taxes does not confer jurisdiction, it is from the nature of things impossible for a court to foresee what, if any, taxes may be assessed in the future."

Precisely, the same allegations are made in the bill of the Louisville Banking Company, and the same objection is applicable. (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Company, p.* 11).

The amount in controversy is in like manner defectively alleged in the bills against Stone, et al., of the Citizens National Bank, Fidelity Trust & Safety Vault Company, Louisvile Trust Company, and First National Bank, to all of which demurrers were sustained (*Record No.* 405, *Citizens National Bank* v. *Stone, et al.*, 8, 11; *Record No.* 407, *Fidelity Trust & Safety Vault Company* v. *Same*, 5, 11; *Record No.* 409, *Louisville Trust Company* v. *Same*, 5, 11; *Record No.* 634, *First National Bank* v. *Same*, 9.)

Again, in none of the bills in these cases is it alleged that the

State court in the prohibition suits had jurisdiction of the parties or the subject-matter of said suits, nor is it alleged that the judgments relied on therein are final and in full force and effect, or have not been set aside, annulled, or superseded. With respect to the judgments in two of said suits, those of the Louisville Banking Company and Third National Bank, it appears they were not rendered until April 13, 1897, after the demurrers to the petitions were sustained, and the defendant had declined to plead further. (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Company*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57.) Under the statute of the State, the right of appeal from said two judgments, and to supersede the same, exists for two years thereafter, or until April 13, 1899. (*Ky. Civil Code, sec.* 745.) It seems reasonably clear that if such appeals should be taken, the Court of Appeals, in view of its decision of March 24, 1897, in the Owensboro bank tax cases, will reverse said judgments.

In *Osborn* v. *Bank of United States*, 9 *Wheat.*, 738, the jurisdiction was upheld against Osborn, Auditor of the State of Ohio, to enjoin him from collecting the State tax levied on the Bank of the United States by an unconstitutional and void legislative act of that State. There the State officers had, for the taxes claimed, seized $100,000 of the bank's money, which was in danger of being lost to the bank, and the necessity of a discovery justified the application to a court of equity. The State officers, made defendants in that action, had a personal interest therein, being individually responsible for the money thus taken from the bank, which had been declared by this court to be exempt from State taxation before the passage of said act, and the wrongful seizure of the bank's money for such taxes.

In these cases, however, the Circuit Court discovered, on an inspection of the bills when demurred to, that the statute of November 11, 1892, was constitutional and valid, and did not impair the obligation of the contract between the complainants and the State; that the State was not a party or privy in any of the litigation set up in the bills; and that its Auditor, Treasurer, and Secretary of State had full power and authority under said act to make the assessments of complainants' franchises for State as well as city taxes, and that the Auditor's right to collect the State taxes on such assessments was manifest. Was not the Circuit Court, under these facts thus presented in the complainants' bills, without jurisdiction to proceed further? Was there anything left for it to do except to dismiss the bills? Yet it retained jurisdiction and rendered the final decrees appealed from by which these State officers are powerless to take a step toward the assessment of the complainants' franchises or intangible property, or in the collection of the State's taxes from the complainants under the only revenue law of the State now in force, or under any statute that may hereafter be enacted, during the corporate existence of these banks.

By its legislative department, the State has repealed the Hewitt Act authorizing its officers to execute its alleged contract on its behalf, and thereby forbidden its said officers from collecting taxes thereunder.

In *Hagood* v. *Southern*, *supra*, it was decided that in a bill for specific performance, where the State was not nominally a party to the record brought against its officers and agents having no personal interest in the subject-matter of the suit, and defending only as representing the city where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constituted a performance of the alleged contract by the State," the court was without jurisdiction because it was a suit against the State.

In *Ex parte Ayres*, *supra*, this court, in referring to this principle announced in the case last cited, said:

"The converse of that proposition must be equally true, because it is contained in it: That is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State."

On this point, this court further stated:

"But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution."

The State not being a party to the prohibition suits, do the judgments in these cases operate as an estoppel against the State for any purpose in executing through its officers the franchise tax law of November 11, 1892, for the benefit of the City of Louisville, the largest city in the State, and which, in many respects, governs for the State?

In the case of *City of Louisville* v. *Commonwealth of Kentucky*, 1 *Duv.*, 297, the court said:

"A municipal corporation, like a State, a county, or the city of Louisville, is much more than a person. While nominally a person, it is vitally a political power; and each, in its prescribed sphere, is '*imperium in imperio.*' All are constituent elements of one total sovereignty. The City of Louisville, to the extent of its jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality."

Can the wise policy of the State, embodied in its present Constitution, and said act of November 11, 1892, of dividing the revenue derived from the taxation of such institutions as these between the

State and the municipality, where they are located, and which protects their property, and affords them all the facilities for the successful transaction of their business, be blocked and nullified by a plea of *res judicata* founded on a judgment in a suit to which the State was not a party? Suppose the Auditor should refuse to accept State taxes from the appellee banks under the Hewitt Act, and he, together with the Treasurer and Secretary of State, constituting the Board of Valuation and Assessment, should proceed to assess their franchises for State taxes, and the Auditor or Attorney General should then take steps by suit to collect from them the State's taxes on such assessments, as required by the revenue law of 1892, which the court below and the highest court in Kentucky have declared to be constitutional, would the Circuit Court, under its decrees herein, have any jurisdiction to punish these State officers for contempt? We insist it would not; and, if not, it was without jurisdiction to render its decrees herein against them. But it may be said it is not likely that these State officers will take that course, because the State taxes against these banks under the Hewitt Act are more than they are under the act of 1892; but this question of jurisdiction can not be made to depend on the will or discretion of the State's officers. The State has already increased its *ad valorem* tax rate for State purposes from 42½ cents on the one hundred dollars, fixed in the act of 1892, to 52½ cents, and may long before the corporate lives of these banks expire increase the latter rate to 80 cents, or to a point in excess of the rate imposed on banks in the Hewitt Act. The interests of the State, as well as the law, would then be with the Auditor in refusing to accept from these banks State taxes under the Hewitt Act, and in demanding the rate fixed in the existing revenue laws of the State. Again, it may be claimed that the *tender* to the Auditor by these banks of the amount of their State taxes under the Hewitt Act would be a compliance with their part of the contract with the State, so as to keep in force its obligation as between them and the City of Louisville. But is that true? Would anything short of *actual payment* by the banks of the taxes to and acceptance by the State, as stipulated in the Hewitt Act, be a compliance therewith, so as to keep the alleged contract in force with respect to the City of Louisville? The immunity is based on this condition precedent in section 4 of the Hewitt Act: "Such bank, and its shares of stock, shall be exempt from all other taxation whatsoever so long as said tax shall be *paid* during the corporate existence of such bank." We are ready to grant as true the proposition that if the State by its Auditor was any longer legally bound to accept the tender from these banks of the amount of their State taxes under the Hewitt Act, and refused to do so, then the tender would be as efficacious to continue in force the contract as an actual payment; but such is not the case, and we contend that if the State is no longer bound by the contract, the City of Louisville is not. The contract was made between two parties, the banks and the State, the latter acting for itself and the City of Louisville, and having the right to withdraw therefrom at any time. This right to withdraw has been exercised by the State through its legislative department, and in doing so, the

status of the parties has been so materially changed that neither party any longer has the legal right to call on the judiciary to specifically enforce the contract against the other. The mutuality of the obligation has legally ceased. Neither the State, nor its officers, can be legally compelled to accept a compliance by the banks of the condition precedent, which is indispensable to entitle the latter to immunity from taxation by the City of Louisville during their corporate existence. The legal right of the State to sue and recover from any of these banks the franchise taxes due the State under the act of 1892, can not be questioned. To such a suit none of these banks has any legal defense whatever. Neither a plea of the acceptance of the Hewitt Act, nor a plea of *res judicata*, would avail, for the State is not estopped by either the original contract or the judgment in any suit to which it was not a party, or in which county and city taxes alone were in controversy. (*Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413.

It seems to us that the peculiar nature of the contract between the banks and the State, as disclosed by the bills in these cases, was such that if all of the parties thereto are no longer bound thereby, neither party is, and unless the plea of *res judicata* set up in the bills estops the State, it does not estop the City of Louisville. We have seen that this plea does not estop the State. Therefore, we contend that the Circuit Court, on the face of the bills, had no jurisdiction; and that the separate demurrers thereto on that ground, filed by Stone, Auditor, et al., and the City of Louisville, ought to have been sustained, and each of them dismissed.

II.

NO JURISDICTION IN EQUITY AND WANT OF EQUITY IN THE BILLS.

1. Before the Federal courts will entertain a suit in equity to restrain the collection of a tax on the ground that the tax is illegal or unconstitutional, there must be some additional grounds shown. As said in the case of *Shelton* v. *Platt*, 139 *U. S.*, 594, where the whole subject was elaborately reviewed by the court:

"There must be some special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is *real estate*, throw a cloud upon the title of the complainant."

To the same effect is the case of *Dows* v. *Chicago*, 11 *Wall.*, 108. In the suits against the City of Louisville it is alleged that the bank will suffer irreparable injury. This is a mere conclusion of law, and is not sufficient to authorize the granting of an injunction.

As stated in *High on Injunctions, vol.* 1, *sec.* 491:

"Nor will mere general averments in the bill of the inadequacy of the remedy at law, or that irreparable injury will be sustained by the sale of complainant's property for taxes, suffice to warrant an injunction, but the *facts* must be stated upon which the court can determine whether such averments are true."

It will be observed in the case of *Shelton* v. *Platt, supra*, above referred to, that where there is an averment of a cloud upon complainant's title will be created by the taxes, in order to authorize a court of equity to intervene on that ground, it must be shown that the property upon which the cloud will be thrown is *real estate*. In only a few of these bills is there an averment that the complainant owns any real estate, and in none of them is it alleged that the title to any such property will be clouded by the taxes sought to be enjoined. This seems to conclusively dispose of the allegation as to a cloud upon the title.

Now, as to the multiplicity of suits, we readily admit that equity will always intervene by injunction to prevent a multiplicity of suits; but, as in the case of the allegation as to irreparable injury, where an injunction is sought on the ground of avoiding a multiplicity of suits, the *facts* must be stated tending to support the allegation as to the danger of a multiplicity of suits. To recover the taxes alleged to be due, the City of Louisville would, of course, have a right of action, and one suit against each particular bank would settle the question, and it is not by any means to be presumed that either the City of Louisville, or the State of Kentucky, would harass any taxpayer by a great number of suits when one suit would suffice to settle the controversy; nor, on the other hand, is it to be presumed that after a suit at law for the collection of the taxes was determined in favor of the taxing power that the bank would still require other suits to be brought. In other words, there is no allegation in these bills, from beginning to end, tending to show any reason for more than one suit at law to settle the question of exemption. In such suit each bank would have ample opportunity to present all its defenses, and to prevent the collection of the taxes claimed, if illegal. This point is aptly illustrated by the decision in the case of *Pacific Express Company* v. *Seibert*, 44 *Fed. Rep.*, 315, where it is said:

"It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each day's penalty, the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting for and in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with law suits. * * * The court will presume that a State is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights."

In the case of *Union Pacific Railway Co.* v. *Cheyenne*, 113 *U. S.*, 516, it is said:

"To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, can not, of themselves, furnish any ground for equitable interposition."

We can not see, therefore, how it can be claimed that there was either any danger of, or necessity for, a multiplicity of suits if the injunction prayed for was not granted, or that any irreparable injury would occur that could not be compensated for in money, or that any cloud upon the title to real estate would result, without the intervention of a court of equity by injunction.

In the case of *Allen* v. *Pullman Palace Car Co.*, 139 *U. S.*, 658, the bills to enjoin the tax contained jurisdictional averments much more comprehensive and specific than those in the cases at bar, and the court there held that the averments were insufficient to give a court of equity jurisdiction to enjoin a tax. So we insist that in order to enjoin a tax on the ground that a multiplicity of suits will ensue, or on the ground that the plaintiff would suffer irreparable injury, the facts must be clearly stated going to show not only the possibility, but the strong probability of a multiplicity of suits, and the facts going to show the irreparable injury alleged must be definitely set out, for it has been many times held that the mere allegation of irreparable injury is only a conclusion of law. Under the statute, the taxes due the City of Louisville on the State Board's assessment could only be collected by suit in court—not by distraint or garnishment, as in the case of tax bills made out on assessments by the City Assessor.

In the argument of these cases in the court below, it was suggested that the United States Circuit Court had recently taken original jurisdiction in the Express Company cases and the Western Union Telegraph Company cases in Ohio and Kentucky, to enjoin the collection of taxes, and that said cases were authority going to establish the jurisdiction in equity of that court in these cases. The cases of the Adams Express Company and the Western Union Telegraph Company in Kentucky were to restrain the Board of Valuation and Assessment from certifying the assessed value of the franchises of said companies respectively to various counties, municipalities, and taxing districts. In the cases in Kentucky it was averred in the bills that unless restrained the Auditor would certify to more than *sixty counties, cities, towns, and taxing districts* throughout the State of Kentucky. This was because the Adams Express Company operated over a large part of Kentucky, as did also the Western Union; so the court will see that there is a marked distinction between those cases and the cases under discussion, for in these cases the Auditor would have to certify to *but one municipality*, to-wit: The City of Louisville, except in the case of the Bank of Kentucky, where the certification would be to the City of Louisville, City of Frankfort, and the County of Franklin. Jefferson County, in which the City of Louisville is situated, under the law, can not and does not collect taxes from residents of the City of Louisville on their property. (*Sec.* 2744, *Ky. Statutes.*)

The bills of the Adams Express Company and Western Union Telegraph Company in the Kentucky cases set out the fact that the value of their franchises would be certified to this large number of counties, cities, towns, and taxing districts, and thereby conclusively showed to the court that these two companies would be subjected to

a multiplicity of vexatious suits, whereas in the cases at bar there is not an allegation of fact going to show even the possibility of a multiplicity of suits. The distinction between the cases is so marked that a statement of the facts is sufficient without further argument. I desire to emphasize the fact that the cases referred to were not suits to restrain the collection of any tax, but they were suits to prevent the Auditor from certifying the assessed value of the franchises of the said companies, already made by said board, which, if done, would subject the companies to great harassment, necessitating their going into various jurisdictions to contest the right to collect the taxes on such certified assessments. Moreover, the court will find that the question of jurisdiction in equity was not raised or discussed either in the Circuit Court or this court in the Kentucky cases. (*Adams Express Company* v. *Kentucky*, 166 *U. S.*, 171; *Western Union Telegraph Company* v. *Norman*, 77 *Fed. Rep.*, 13).

In the Express Company cases in Ohio, the bills sought to enjoin the State tax appraisers from certifying certain taxes to the auditors of *eighty-seven* counties in the State. (*Sanford, &c.*, v. *Poe*, 37 *U. S. App.*, 378; *Adams Express Company* v. *Ohio State Auditor*, 165 *U. S.*, 194).

Section 3008 (*Ky. Stats.*) is relied on to authorize this court to entertain jurisdiction in equity. The language of that section is as follows:

"Any court of competent jurisdiction, not inferior to a circuit court, may, in the *established* modes of proceedings, and upon *existing* principles of *law* or equity, *give redress* against unlawful distraints or garnishments of rents that may be wrongfully made or threatened under color of *this act;* but no injunction shall be granted in such proceeding except by the court or its judge, nor otherwise than upon notice to said city, and after a hearing."

This section is a part of the "act for the government of cities of the first class," approved July 1, 1893, and relates to the collection of tax bills made out upon assessments of the City Assessor. This is clearly apparent on an examination of the preceding sections, 2997 to 3007, inclusive. The City Assessor is required to make out the tax-bills on his own assessments as of September 1, in December, and list them with the Tax Receiver by the third day of January, or as soon thereafter as practicable. A discount is allowed on those paid in January, February, and March. All tax-bills which remain in the hands of the Tax Receiver on May 1, succeeding the date on which they are listed, bear interest at the rate of one-half of one per cent. for every month or fraction of a month. In the month of May and June, notices are required to be issued by the Tax Receiver to those in arrears, notifying them that if their taxes are not paid by August 20, the same will be "collected by distraint or garnishment of rents, with penalty added." On July 1 the Tax Receiver is required to make out a list of all tax-bills remaining unpaid, showing those notified, and file it with the Comptroller. Between August 1 and 21, the Comptroller is required to make out for the tax-bills unpaid warrants of distraint, which may be levied by the Tax Receiver on the goods

and chattels belonging to the person assessed; and after November 15, rents owing by tenants to tax-payers in arrears may be garnisheed. On May 1 of the second year after assessment, the Tax Receiver is required to make out a list of unpaid tax-bills and deliver the same to the City Attorney, whose duty it shall be to bring suits thereon.

These provisions have no application to the tax-bills of banks and trust companies made out on the assessments by the Board of Valuation and Assessment, under the act of November 11, 1892. The banks and trust companies are not required to file their annual reports until March 1, which are to be made up to and including December 31, preceding. The taxes owing by them are not due and payable until July 1, and a failure to pay them then subjects the delinquents to the same fines and penalties as are prescribed against other corporations, companies, and associations, whose franchises are required to be assessed by the board. (*Secs.* 4091, 4092, *Ky. Stats.*) The non-payment of State taxes, penalty, and interest, after becoming delinquent, is made a misdemeanor by the statute, punishable by a fine of $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction. The City of Louisville, therefore, has no remedy by *distraint or garnishment* against banks and trust companies in the collectien of taxes on their franchises. The banks and similar corporations are assessed, and taxes due from them to the city are collected in a different mode from ordinary tax payers. They are not entitled to any discount for prompt payment. (*L. & N. R. R. Co.* v. *City of Louisville*, 166 *U. S.*, 709.)

By *section* 3008 (*Ky. Stats.*), cited by counsel for complainants, courts may "give redress, in the established modes of proceedings and upon existing principles of law or equity, against unlawful restraints or garnishments of rents that may be wrongfully made or threatened under color of *this act.*"

Now, the appellee, City of Louisville, was not sought to be enjoined by any of the complainants in these actions from making "unlawful distraints or garnishments of rents, wrongfully made or threatened under color of this act;" that is, the "Act for the government of cities of the first class," approved July 1, 1893. The taxes claimed against the banks are under a different act, that of November 11, 1892. Furthermore, while the section referred to provides that courts may "give redress" against these "unlawful distraints or garnishments of rents," it does not prescribe any specific mode or that the "redress" shall be by injunction, or in a court of equity. It merely states, "but no injunction shall be granted in such proceeding, except by the court or its judge, nor otherwise, than upon notice to said city, and after a hearing." This clause is negative, not affirmative. It confers no power on a court not before possessed, nor is it a statutory provision that the remedy in such cases shall be by injunction. In the case of *Cummings* v. *Merchants National Bank of Toledo*, 101 *U. S.*, 156, the statute of Ohio expressly provided for an injunction against the illegal levy of taxes and assessments or the collection of them. (*Sec.* 5848, *Rev. Stats. Ohio*, 1880.) Even with respect to that statute, the court, in the case cited, stated:

"And though we have repeatedly decided in this court that the statute of a State can not control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a State created a *new* right or provided a *new* remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires."

No new right or new remedy is expressly conferred on complainants by the Kentucky statute. On this point we cite the following cases: *Van Norden* v. *Morton*, 99 *U. S.*, 378–82; *Thompson* v. *R. R. Co.*, 73 *U. S.*, 134. In the latter case the court said:

"The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the State courts have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit;" citing *Robinson* v. *Campbell*, 3 *Wheat.*, 212, and *Bennett* v. *Butterworth*, 11 *How.*, 669, to which we take leave to add: *Jones* v. *McMasters*, 20 *How.*, 8, and *Basey* v. *Gallagher*, 20 *Wall.*, 680.

In the case of *City of New Orleans, et al.* v. *Citizens Bank of Louisiana*, 167 *U. S.*, 371 (which we shall further notice on another point), the jurisdiction in equity was entertained evidently on the ground of avoiding a multiplicity of suits, for the action by the Citizens Bank was brought against the City of New Orleans, the Board of State Assessors, and the State tax collectors for the various collection districts in the parish of Orleans, and a supplemental bill was filed against the sheriffs of *thirteen* parishes in the State of Louisiana outside of the parish of Orleans. Furthermore, no question as to jurisdiction in that case appears to have been made in this court.

In a recent case (*Pittsburg, etc., Railroad Co.* v. *Board of Public Works of West Virginia, decided November* 28, 1898), following the doctrine of the cases above cited, this court, by Justice Gray, held that the collection of taxes assessed under the authority of a State is not to be restrained by injunction from a Federal court unless it clearly appears not only that the tax is illegal, but also that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction, and quoted with approval the following from the opinion of Chief Justice Fuller in *Shelton* v. *Platt, supra:*

"The trespass involved in the levy of the distress warrant was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express com-

pany to pay the amount of the taxes claimed, nor any averment showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage, and inconvenience which would be in their nature irremediable."

The grounds on which the Circuit Court sustained its jurisdiction in equity in these cases, as stated in the opinion in the Bank of Kentucky case (*Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 390–392), in substance are (1) the inadequacy of the remedy at law, and (2) the avoidance of a multiplicity of suits.

In Kentucky it is well settled that wherever by a statute a summary remedy exists for the collection of the taxes claimed, such as the power given to a collecting officer to distrain and sell personal property, although not exercised, the taxes paid to a municipality, if illegal, may be recovered back, because under such circumstances the payment is deemed involuntary. (*Covington* v. *Powell*, 2 *Met.*, 231; *Louisville* v. *Henning*, 1 *Bush*, 382; *Louisville* v. *Anderson*, 79 *Ky.*, 344.)

The statement in the opinion of the lower court last referred to, that "the remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint," is incorrect. It likewise exists where the collecting officer may by statute resort to distraint, whether he does so or not; and by the decisions of the Court of Appeals of that State it is as well settled that this right exists as if there were a special statute so providing, as there was in Tennessee in the case of *Shelton* v. *Platt, supra*. Of course, if taxes are paid to a State, county, or municipality when suit is the only remedy provided by statute for their collection, the payment is deemed voluntary, if made without or before suit is brought, and although the taxes may be illegal, they can not be recovered back. (*L. & N. R. R. Co.* v. *Commonwealth, for the use of Marion County*, 89 *Ky.*, 531.)

Section 733 of the Revised Statutes of the United States provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

If it be true, as alleged in the bills in these cases, that the City of Louisville has the power to distrain and sell property in collecting its taxes based on the assessments of the franchises of banks by the Board of Valuation and Assessment (which is not conceded), then the payment of such taxes by a bank would be involuntary and the amount could be recovered back from the city by a suit at law. The inability of the bank to pay, or the city to return the amount of such taxes, is not alleged in either case. The ability and solvency of both are conceded. On the other hand, if there is no power in the city to distrain and sell the bank's property to pay such taxes, and the remedy is confind under the statute to a suit at law for a personal judgment, the bank has the fullest opportunity in the State court to make all defenses it may have arising under the Constitution or laws of the State or United States, and if a Federal question is raised and decided adversely to it by the highest court in the State, that question may be reviewed on a writ of error by this court.

The penalties prescribed in the statute, recoverable by indictment or civil action in the Franklin Circuit Court, the fiscal court of the State, are imposed for delinquencies concerning and in the payment of State taxes, not municipal taxes. We have already seen, insofar as these cases are to be regarded as suits against the State, or to enjoin the State's taxes against banks under the act of November 11, 1892, they can not be maintained. Therefore, all the Circuit Court has said with respect to the remedy by defending a suit at law being attended with the risk of incurring such penalties during "the time necessarily consumed in a reasonable litigation of the question of the validity of the tax," has no application to the defense of a suit brought by the City of Louisville.

So the case of *Gates* v. *Barnett*, 79 *Ky*, 295, referred to by the Circuit Court as authority to sustain its jurisdiction in equity has no bearing on the question under discussion, viz.: the jurisdiction in equity to enjoin the taxes claimed to be due the City of Louisville. In that case the court sustained the right to enjoin an illegel State tax, because the officer acting in good faith and under color of right, was not liable as a trespasser, and as a suit would not lie against the State directly, the only complete remedy was by injunction against said collecting officer.

Under sections 162 and 163, Kentucky Statutes, it is made the duty of the Auditor, when it shall appear to him that money has been paid into the treasury for taxes when no such taxes were in fact due, to issue his warrant on the treasury for such money so improperly paid in behalf of the person who paid the same, where application is made therefor within two years from the time when such payment was made. It is clear that the discharge of this duty by the Auditor may be enforced by mandamus.

2. But there is another ground on which the Circuit Court should have refused to entertain jurisdiction in equity in these cases, viz: The want of equity in the bills under the plea of *res judicata*. The authorities are clear that where the aid of a court of equity is sought to carry into effect by the extraordinary remedy of injunction, a former judgment relied on as an estoppel, such aid should be refused unless it shall be made to appear that the judgment thus pleaded is right and just. Especially is this true where the complainant invites the court's inspection of the record in which the former judgment was recovered, or by by the allegations of his bill opens up the question of its validity or correctness, as do complainants here in stating all the facts connected with their acceptance of the Hewitt Act, and asking the court to adjudge that by reason thereof they have an irrepealable contract with the State to pay taxes only as provided in said act. (*Bigelow on Estoppel, 5th edition*, 102–3; *Herman on Estoppel and Res Judicata, volume* 1, 10; *Adams Equity*, 788; *Wahdams* v. *Gay*, 73 *Ill.*, 467, 428.)

In *O'Connell* v. *McNamara*, 3 *Dru. & War.*, 411, Lord Chancellor Sugden said:

"I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit

of a former decree, he must be prepared to shew, if the case requires it, that such decree was right."

In such cases Lord Hardwicke announced this rule as the one by which he was guided: "When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong." (1 *Equity Cases Abr.* 83, *pl.* 3.)

Herman on Estoppel (sec. 1295) states:

"Whenever the application of the doctrine of estoppel would be likely to defeat the principle upon which it rests—to effect justice and prevent wrong—it becomes the duty of the courts to prevent its application."

In *Brownsville* v. *Loague*, 129 *U. S.*, 502–5, the appellee, Loague's intestate, Baker, had recovered four judgments by default, in 1876–7–8, against the City of Brownsville, Tennessee, on certain coupons which had matured on said city's bonds issued under an act of the legislature, passed February 8, 1870, on which judgments executions had been issued and returned *nulla bona*. The appellee then instituted proceedings in the Circuit Court of the United States for the Western District of Tennessee, to compel said city by mandamus to levy and collect a tax to satisfy said judgments. In 1879 the legislature repealed the charter of Brownsville, but provided that the repealing act should "not be so construed as to impair the obligation of existing contracts into which said corporation has heretofore entered." The mandamus was awarded by the court below, which held that the judgments on the coupons conclusively established the validity of the bonds, and also the validity of the subsequent legislation giving a remedy by a levy of taxes for their payment. This court held that the city was not estopped by the judgments rendered from setting up the repeal of the act of February 8, 1870, by the State Constitution of May 5, 1870, before the bonds were issued. Mr. Chief Justice Fuller, in the opinion, states:

"Under the legislation between the issue of the bonds in 1870 and this application in March, 1886, authority to levy taxes to pay debts of the character represented by these judgments, when uncompromised, did not exist at the latter date, so that plaintiff was remitted, in the assertion of a right to that remedy, to the time when the bonds were issued, and as the city had then no power to tax to pay them other than that derived from the act of February 8, 1870, the relator by his pleadings opened the facts which attended the judgments for the purpose of counting upon that act as furnishing the remedy which he sought. In this he in effect asked the court to order the levy of a tax to pay the coupons, and relied on the judgments principally as creating an estoppel upon a denial of the power to do so.

"Thus invited to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff *ex debito justitiae* to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued?"

Further on the opinion states:

"*Res judicata* may render straight that which is crooked, and black that which is white, * * * but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever.

"The judgment is reversed and the cause remanded with a direction to dismiss the petition."

Should not the same rule be applied by this court where an injunction instead of a mandamus was applied for in the Circuit Court of the United States to enforce or give effect to State court judgments, when it has reached the conclusion, on the invitation of complainants "to look through the judgments to the contracts on which they are founded", that said judgments are not only erroneous, but that they "rest upon no cause of action whatever," by reason of the fact that the Hewitt Act had been repealed and was not in existence when said judgments were rendered?

Here the grossest discrimination results from granting the relief asked by injunction under the plea of *res judicata* to about one-half in number and capitalization of the banks of the City of Louisville, while the other half—by reason of what the Circuit Court in one of these cases is pleased to call "the accident of litigation" (*First National Bank* v. *Stone, et al.*, 88 *Fed. Rep.*, 412), and not from any inequality established by the law itself, which bears on all alike—must carry more than their full burden of local taxation. This renders it impossible for the tax-paying banks to compete successfully in business with the non-tax-paying banks.

In *Bigelow on Estoppel*, *5th edition*, 706, the author states:

"The estoppel by record is legal, and hence to give a court of equity jurisdiction to entertain it, it would be necessary to show *some equity* apart from the estoppel."

We submit that the Circuit Court erred in not sustaining appellants' demurrers to appellees' bills (1), because they did not state facts showing jurisdiction in equity; and (2) in not dismissing them for want of equity.

III.

PLEA OF RES JUDICATA BY THE BANKS THAT BROUGHT PROHIBITION SUITS.

Having already discussed, on the question of jurisdiction, the plea of *res judicata*, so far as the State is concerned, and shown that the State is not estopped thereby, we shall now discuss this plea by the three banks that were the plaintiffs in the prohibition suits wherein the judgments relied on were recovered. After the adoption of the present State Constitution, the legislature passed an act entitled "An

act for the government of cities of the first class," which was approved and took effect under an emergency clause, July 1, 1893. (*Kentucky Statutes, secs. 2742 to 3037, both inclusive.*) Louisville is the only city of the first class in the State. (*Ib., sec. 2740*).

By Section 3010, (*Ky. Stats*) it is provided:

"The Sinking Fund to pay the bonded debt of the city is hereby continued as now established by law."

Under the law then and now in force, the Mayor, the President of the Board of Aldermen for the time being, and three persons to be chosen by the General Council on joint ballot, and their successors in office, constitute the "Commissioners of the Sinking Fund of the City of Louisville;" and by that name they have corporate powers and existence, may sue and be sued, and do and perform all things necessary to execute the duties required and powers given them by the act of incorporation, which are to receive and manage the Sinking Fund set apart to pay the bonded indebtedness of the city, until the same is fully paid and satisfied.

By section 3011 (*Ky. Stats.*): "The General Council may, by ordinance, provide for certain licenses, to be paid into the Sinking Fund, on callings, occupations, and professions. In the list is the following:

"*Bank, trust, or title company.* For each bank, trust, and title company, the license tax shall be not less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city."

In pusuance of said section, an ordinance was passed by the General Council, entitled "An ordinance relating to assessments," which was approved by the Mayor August 9, 1892. (*Appendix to this brief, Ordinance No. 1.*) In this ordinance the City Assessor was authorized and directed to make an assessment as of September 1, 1893, for the ensuing fiscal year ending August 31, 1894, of "all lands and improvements, and all personal property, *not used or employed in some business or occupation from which a license tax is required*, subject to taxation in the City of Louisville." Following this assessment ordinance, the General Council passed a levy ordinance, entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," which was approved by the Mayor, December 21, 1893. (*Ib., Ordinance No. 2.*) The first section of this ordinance is as follows:

"That the following *ad valorem* tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements and such personalty as is *not used and employed in business paying a license tax for such business*, and in each case on each $100 in value, but shall not be levied upon any property exempt from taxation." (Here follows a list of the purposes and the amount levied for each, aggregating $1.88).

To carry out the theory of the city officials then in authority, and the system of taxation incorporated in said "Act for the government of cities of the first class," the General Council passed an ordinance, entitled "An ordinance concerning certain licenses in the City of Louisville," which was approved by the Mayor, January 29, 1894, (*Ib., Ordinance No. 3*). The third section thereof was as follows:

"Each bank and trust company shall pay an annual license tax of four per cent. of its gross earnings, exclusive of rent from real estate paying taxes in the City of Louisville."

Subsequently, the appellees, Bank of Kentucky, Louisville Banking Company, and Third National Bank, having refused to pay said license tax, were proceeded against by the Commissioners of the Sinking Fund. Warrants were taken out in the police court of the city against said three banks for conducting the banking business without paying the license tax therefor, the penalty of which, under said ordinance of January 29, 1894, was a fine of "not less than five dollars nor more than one hundred dollars for each offense," each day the violation was continued constituting a separate offense. These three banks instituted their separate actions in the Jefferson Circuit Court against R. H. Thompson, Judge of the Police Court of the City of Louisville, for a writ of prohibition *against said court* to prohibit it from proceeding in the matter of the warrants sued out therein against the plaintiff banks for failing to pay the license fee or tax The prayer in the petition in each of these cases also asked, on final hearing, that the court adjudge "that *said license ordinance* and *said act for the government of cities of the first class*, in so far as they authorize a tax in any form to be levied against and collected from plaintiff, be declared unconstitutional and void."

In the body of each of the petitions in these three cases it is in substance charged as the grounds for the relief sought that (1) the plaintiff bank had an irrepealable contract with the State under the Hewitt bill, and (2) that so much of the "act for the government of cities of the first class" as gave to the City of Louisville the power, by ordinance, to collect a license tax from banks, and the license ordinance of January 29, 1894, passed in pursuance of said act, were "both unconstitutional and void."

The City of Louisville, as the petition in each case shows, was *not* made a party defendant to either of said three actions. The Judge of the Police Court of the City of Louisville was the sole defendant in each case. (*Record No.* 356 *Stone,et al.* v. *Bank of Kentucky*, 77–83; *Record No.* 360, *Stone, et al.* v. *Louisville Banking Co.*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 17–21). The warrants in the Police Court, as alleged in these petitions, were sued out by the Commissioners of the Sinking Fund. Hon. Henry S. Baker was then City Attorney of the City of Louisville, and also the employed attorney of said Commissioners. He represented the defendant, and filed a general demurrer to the petition in each case. This demurrer was overruled by Hon. Emmet Field, Judge of the Common Pleas Division of the Jefferson Circuit Court, as to the petition of the Bank of Kentucky, and sustained as to the petitions of the Louisville Banking Company and Third National Bank. The judgment of said Circuit Court in the former case was as follows (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 88–89):

"At a court held for the court aforesaid on the 24th day of July, 1894.

"This cause having been heard and submitted on demurrer, and the court being advised, it is adjudged that the plaintiff's petition sets

forth a good cause of action, and the defendant's demurrer to said petition is overruled, to which the defendants except; and the defendants in open court declined to answer or plead further herein; and thereupon the plaintiff moved for judgment, and it is considered by the court that the prayer of the petition be granted and *that the City of Louisville and R. H. Thompson, Judge of the Louisville City Court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, the Bank of Kentucky, in the City of Louisville, or making any further order therein;* and it is further considered that the plaintiff recover of the defendant, the City of Louisville, its costs herein expended and may have execution therefor. To all of which defendants except and pray an appeal to the Court of Appeals, which is granted."

This judgment was affirmed by the Court of Appeals June 1, 1895, and remains as entered in the lower court. The judgments in the latter two cases entered by the Jefferson Circuit Court, in pursuance of the mandate of reversal from the Court of Appeals, after its decision of June 1, 1895, are as follows (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Co.*, 25–35; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57):

"At a court held on the 13th day of April, 1897.

"This day came the plaintiff, the Louisville Banking Company, and filed the opinion and mandate of the Court of Appeals herein, the mandatory part of which is as follows: 'It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion.' And, thereupon, in pursuance of said opinion and mandate, the judgment heretofore entered herein is set aside and held for naught.

"It is now adjudged by the court that the plaintiff's petition sets forth a good cause of action and the defendant's demurrer to the said petition is overruled, and the defendant declined to plead further herein, and thereupon the plaintiff moved for judgment; and it is considered that the prayer of the plaintiff's petition be granted, and *that the defendant, R. H. Thompson, Judge of the Police Court of the City of Louisville, be and he is hereby prohibited from proceeding further with the warrant against the plaintiff, Louisville Banking Company, mentioned in the petition in the Police Court of the City of Louisville, or making any further order therein*; and it is further considered and adjudged that the plaintiff recover of the defendant its costs herein expended, and may have execution therefor, and the parties are hence dismissed."

"At a court held on the 13th day of April, 1897:

"This day came the plaintiff, the Third National Bank, and filed the opinion and mandate of the Court of Appeals herein, the mandatory part of which is as follows: 'It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion.' And, thereupon, in pursuance of said opinion and mandate heretofore entered herein, the judgment heretofore entered herein is set aside and held for naught.

"It is now adjudged by the court that the plaintiff's petition sets forth a good cause of action and the defendant's demurrer to the said

petition is overruled, and the defendant declined to plead further herein, and thereupon the plaintiff moved for judgment; and it is considered that the prayer of the plaintiff's petition be granted, and *that the defendant, R. H. Thompson, Judge of the Police Court of the City of Louisville, be and he is hereby prohibited from proceeding further with the warrant against the plaintiff, Third National Bank, mentioned in the petition, in the Police Court of the City of Louisville, or making any further order therein;* and it is further considered and adjudged that the plaintiff recover of the defendant its costs herein expended and may have execution therefor, and the parties are hence dismissed."

In the copies of the transcripts on the appeals to the Court of Appeals in these three cases it appears that the City of Louisville was joined with R. H. Thompson, Judge of the Police Court of the City of Louisville, as an appellant, in the appeal against the Bank of Kentucky, and that the City of Louisville was joined, as an appellee, with said Judge of the Police Court in the appeals of the Louisville Banking Company and Third National Bank. By what authority the city was made an appellant in the one case and an appallee in the other two, the records do not disclose. We submit that, as the city was not made a defendant by the petition in either of these three cases, and was not, therefore, a defendant or a party to the record in either case, the adjudication in the said cases do not conclude the city as to the thing adjudged.

This leads to the main question involved under the plea of *res judicata*. What was, in fact, the thing adjudged in these three cases? Appellees, Bank of Kentucky, Louisville Banking Company, and Third National Bank, contend that the thing adjudged was that each of them had an irrepealable contract with the State by reason of their acceptance of, and compliance with, the provisions of the Hewitt Act, whereby they are exempted from all taxes, except as provided in said act, during their respective corporate lives. This we deny, and insist that the thing adjudged in these cases was that the license tax imposed by said ordinance of January 29, 1894, of four per cent. on the annual gross earnings of banks doing business in the City of Louisville was invalid and not collectible by law, and by their doing a banking business without paying said license tax, said three banks did not become liable in the prosecution of the warrants issued against them for the fine or penalty fixed in said ordinance.

It is a well settled principle of law that courts, in order to ascertain what has been adjudicated, will look to the *judgment* itself, and not to the reasons given by the court in its opinion. The question on a plea of *res judicata* is, what was *decided?* Not what were the the *reasons* of the court for so deciding. This rule is laid down by *Herman on Estoppel, sec.* 402, as follows:

"In determining what has been adjudged, courts will regard the *decree*, and in case of *ambiguity*, but *not otherwise*, be governed by an accompanying *opinion;* where it is *free from ambiguity*, it speaks for *itself*, and can not be *qualified by the opinion* by which it may have been preceded."

The question of irrepealable contract is not mentioned in the final judgment in either of these three cases. In neither of these judg-

ments is it adjudged that the plaintiff bank has an irrepealable contract with the State, whereby it is exempted from all municipal taxation during its corporate existence. The vital and only thing adjudged, was simply this, and nothing more, to-wit:

"The defendant, R. H. Thompson, Judge of the Police Court of the City of Louisville, be and he is hereby prohibited from proceeding further with the warrant against the plaintiff mentioned in the petition in the Police Court of the City of Louisville, or making any further order therein."

This ordinance, the act under which it was passed, and the system of license taxation adopted by the City of Louisville on certain callings, occupations, and professions, in so far as they undertook to impose a license tax in lieu of *ad valorem* taxation, were unconstitutional and void. It may be, therefore, that each of these petitions in that respect "*did* set forth a good cause of action." This license fee against banks and trust companies of four per cent. on their gross earnings in lieu of an *ad valorem* tax was in conflict with the State Constitution, and the Court of Appeals so decided on May 5, 1895, in the case of *Levi* v. *City of Louisville*, 97 *Ky.*, 394, nearly a month before its decision of June 1, 1895, in the cases of said three banks and others (97 *Ky.*, 590).

In the *Levi* case, the Court of Appeals held (*Ib.*, 401):

"There is but one general system of assessment as to all property under the present Constitution for the purpose of government, whether State or municipal, and in addition taxation may be based on income, on license, and on franchises, and a head or poll-tax. The *ad valorem* system relates to the assessment and taxation of all *property*; the income tax to the *product* or *income* from property and from business pursuits. The license tax is one imposed on the *privilege* of exercising certain callings, professions, or vocations, that when collected, goes into the State treasury, and when applied to municipal taxation is termed *license fees*. A license based on franchises includes the ascertainment of its value, and the mode of determining that value. The power to impose an income tax, a license, or franchise tax, is expressly given by the Constitution to the legislature, and the exercise of such powers by the municipal governments must be derived from legislative enactments; but there is no authority, express or implied, conferred by the Constitution on either the State or municipal legislature to *substitute a license tax in lieu of the ad valorem system.*"

It will be observed by an examination of that case that the court held that the ordinance for the assessment of personal property as of September 1, 1893, in such manner as to omit therefrom such as was used or employed in a business or occupation from which a license fee was required, the omission of like property from the levy for the fiscal year ending August 31, 1894, and the ordinance of January 29, 1894, so far as it fixed a license tax on certain enumerated things and occupations in lieu of an *ad valorem* tax on the personal property used or employed therein, were all illegal, and this system of municipal taxation was condemned as in conflict with the present State Constitution. It was not, therefore, *neces-*

sary, on June 1, 1895, after the decision in the *Levi* case, rendered May 5, 1895, for the Court of Appeals to pass on the claim to an irrepealable contract in said suits of the Bank of Kentucky, Louisville Banking Company, and Third National Bank. The license ordinance under which the warrants in the police court were issued against said three banks being unconstitutional and void, on the ground mentioned, not only against said three banks, but all banks, State and National, old and new, in the city of Louisville, all that was stated in the opinion of June 1, 1895, with respect to the question of contract under the provisions of the Hewitt Act in the cases of said three banks for a writ of prohibition was merely *dicta*. The license tax sought to be imposed was an *occupation* tax—not a *property* tax. As the court states in the *Levi* case (*Ib.*, 406):

"The words 'license tax' imply a burden on that which is *not* property, but results from its enjoyment, or the conduct of the business or calling."

The subject-matter, as well as the parties to the said suits for a writ of prohibition, were not the same as they are in these suits brought in the court below by the Bank of Kentucky, Louisville Banking Company, and Third National Bank against the City of Louisville, and those against the members of the State Board of Valuation and Assessment, and the City of Louisville. In the former suits, the validity of a license or *occupation* tax of four per cent. on the gross earnings of all the banks and trust companies in the City of Louisville, imposed in lieu of an *ad valorem* tax on their property, was involved, while in these suits a *property* tax alone on said three banks respectively is involved. The former proceeding was against a *court* of inferior jurisdiction—the Police Court of the City of Louisville—under sections 474 and 479 of the Civil Code of Kentucky, to prohibit said court from proceeding in a matter out of its jurisdiction, or to enforce penalties in a prosecution against the plaintiff banks prescribed by an unconstitutional and void ordinance. These sections of said Civil Code are as follows:

"Sec. 474. Writs of mandamus, except those used by a court for enforcing its judgments or orders, and writs of prohibition, shall be obtained by motion, and prosecuted in the manner provided in title ten, chapter five, except that the applicant shall file a petition, wherein he shall state the cause and ground of his application before giving notice of his motion; to which the party against whom the mandamus or prohibition is sought shall file a demurrer or an answer, at or before the time fixed for making the motion.

"Sec. 479. The writ of prohibition is an order of the circuit court *to an inferior court* of limited jurisdiction, prohibiting *it* from proceeding in a matter out of its jurisdiction."

Said prohibition suits were not instituted under *sec.* 2022, *Kentucky Statutes*, which only applies to an ordinance where the fine is fixed at twenty dollars or less. Here, in the license ordinance of January 29, 1894, the fine was fixed at not less than five dollars nor more than one hundred dollars for each offense.

The prosecution of said warrants in the police court was in the nature of a criminal proceeding, while these injunction suits are civil proceedings.

In defining the nature of a prohibition proceeding, and the difference between it and an injunction, *Spelling on Extraordinary Relief, sec.* 1717, states:

"Injunction never questions the jurisdiction, nor is addressed to the *court;* it only lies against the *parties.* Prohibition, on the contrary, *takes no notice of the parties,* ignoring for the most part any interest they may have in the matter forming the subject-matter of the grievance, and goes direct against the *court.*"

The right of the City of Louisville to assess and collect ad valorem taxes from said three banks, or banks and trust companies generally, on their *property,* or the *shares of stock* therein, was not in issue or involved at all in said prohibition suits.

In *Cromwell* v. *County of Sac,* 94 *U. S.,* 351, it appeared that in a suit on certain coupons originally attached to bonds issued by the county for the erection of a court-house, it was decided that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value, and inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover; but it was held that the judgment did not estop the plaintiff, holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing in a second action against the county that he acquired such other bonds and coupons for value before maturity.

In *Davis* v. *Brown,* 94 *U. S.,* 423, it was held that when a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action.

In *Packet Co.* v. *Sickles,* 72 *U. S.,* 580, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading an estoppel, or is relied upon as evidence, was stated to be substantially this: That, to render the judgment conclusive, "it must appear by the record of the prior suit that the *particular matter sought to be concluded was necessarily tried or determined;* that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; * * but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and *judgment necessarily involved its consideration and determination, it will not be concluded.*"

Tested by this rule the City of Louisville can not be concluded or estopped in these injunction suits from claiming the right to collect ad valorem taxes from said three banks on their property, because, as already shown, the judgment rendered in said prohibition suits did not "necessarily involve the consideration and determination" of such right or the claim to an irrepealable contract under the Hewitt Act by said banks. Exemption from property taxes not being involved in said suits, it was not *necessarily* determined. The same judgments

would necessarily have been rendered if the prohibition suits had been brought by banks which made no pretense of having an irrevocable contract, because the license ordinance was (as had been previously decided by the Court of Appeals on May 5, 1895) unconstitutional and void on another and totally different ground, as against *all* banks and trust companies doing business in the City of Louisville, regardless of whether or not they were even in existence when the Hewitt Act was enacted or had complied with its provisions.

In *United States* v. *The Haytien Republic*, 154 *U. S.*, 118–29, this court (Justice White delivering the opinion) stated:

"The elementary principle which governs the availability of the plea of 'other suit pending' was thus stated in *Watson* v. *Jones*, 80 *U. S.*, 715:

"'When the pendency of such suit is set up to defeat another, the *case* must be the *same*. There must be the *same rights* asserted and the *same relief* prayed for; the relief must be founded upon the *same facts*, and the title, or essential basis of the relief sought must be the *same*.'

"In the case first cited it was said that the true test of the sufficiency of the plea of 'other suit pending' in another forum was the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit. (*Dick* v. *Gilmer*, 4 *La. Ann.*, 520; *Bischoff* v. *Theurer*, 8 *La. Ann.*, 15.)

"The efficiency of the test, thus applied, results from the fact that the elements constituting 'the thing adjudged,' and those necessary for the plea of 'other suit pending' are *identical*."

In the case of *County of Shelby* v. *Union & Planters Bank*, 161 *U. S.*, 149–61, this court held that when construing the meaning of a State statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, it was not bound by the previous decisions of the State court, except when they have been so long and so firmly established as to constitute a rule of property, but will decide independently whether there is a contract and whether its obligation is impaired. It was decided in that case that a provision in a bank charter that a certain tax on the shares of stock should be "in lieu of all other taxes," exempted such shares in the hands of shareholders from further taxation, but did not exempt the corporation from taxation on its capital stock, or surplus, or accumulated profits. This decision, too, was rendered, notwithstanding a long line of decisions by the Supreme Court of Tennessee holding that (1) the charter rate of taxation was laid upon the corporate capital stock, and that stock was exempted from any further tax, and (2) subsequent to the decision in *Farrington* v. *Tennessee*, 95 *U. S.*, 697, and in *Bank of Commerce* v. *Tennessee*, 104 *U. S.*, 493, that under such a clause in a bank charter the tax was on the shares, and the exemption covered both the capital stock and the shares thereof.

In the case of *Phenix Fire & Marine Insurance Co. of Memphis* v. *State of Tennessee*, 161 *U. S.*, 174–86, which we have already cited on the question of jurisdiction, this court held that a well founded doubt is equivalent to a denial of the claim to an exemption from tax-

ation; the universal rule in regard to taxation is that the power and the right to tax are always presumed; the exemption from taxation must be clearly granted; and mere silence is the same as a denial of emption. In that case the stockholders of the corporation claiming the exemption relied on a plea of *res judicata*. The Supreme Court of Tennessee disregarded the former adjudication, and this court held that the decision of the highest court of a State on the question of whether or not a judgment by a court of the same State constituted an estoppel would not be reviewed, because no Federal question was raised thereby.

It can not be claimed, in these cases, that this court is bound by previous decisions of the State court in Kentucky so long and so firmly established as to constitute a rule of property. There have been only two decisions of the Court of Appeals as to the claim to an irrevocable contract under the Hewitt Act, both rendered within two years before the filing of complainants' bills in these actions, one on June 1, 1895, upholding the said claim, and the other on March 24, 1897, rejecting it and expressly overruling the former decision.

In the case of the *Commonwealth* v. *Douglass*, 100 *Ky.*, 116; *S. C.*, 168 *U. S.*, 488, Douglass claimed to be the owner of certain lottery privileges, which he had purchased for value under a sale authorized by the legislature of Kentucky, before the adoption of the present State Constitution, and the Commonwealth sought to prevent the operation of lotteries by Douglass under these legislative grants. An inviolable contract was insisted upon and the plea of *res judicata* was urged, consisting of adjudications of the Court of Appeals, some of which sustained the validity of one or more of the privileges owned by Douglass. The court on this plea stated (*Ib.*, 126):

"It is contended that the subject of the appellee's right is *res adjudicata* in this court. It is sufficient to say that the State had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right of the State to repeal it. *And the decisions of this court that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been virtually overruled by the Supreme Court of the United States, destroys the contention of the res adjudicata.*"

Applying the doctrine here announced, the former adjudication construing the Hewitt Act in the bank tax cases of June 1, 1895, having been expressly overruled in similar cases by the same court March 24, 1897, the lower court should not have given greater effect to the plea of *res judicata* based on the opinion of June 1, 1895, than the Court of Appeals itself would (in the light of its decision in the Douglass case) have given thereto after it had been overruled.

★ In the case of *Peck* v. *State*, 137 *N. Y.*, 372, it was held that a certificate issued to a contractor by a board of managers of an insane asylum, by virtue of a writ of mandamus, showing the amount due him from the State, does not bind it as *res judicata* in a suit for the debt before the board of claims. The court said:

"The important question to be determined upon this appeal is whether or not the judgment in the mandamus proceeding against

* There is no conflict between the decision of this court in the case last cited (*Douglass* v. *Kentucky*, 168 *U. S.*, 488) and that in *Phœnix Fire and Marine Insurance Co.* v. *Tennessee*, *supra*. In the *Douglass* case it was decided that a lottery grant was not a contract within the meaning of the Constitution of the United States, but simply a gratuity or license which the State, under its police power and for the protection of public morals, might at any time revoke. The plea of *res judicata* in that case (after the vital Federal question had been reviewed and decided adversely to the plaintiff in error) was discussed by this court, and held not to constitute an estoppel against the State. The State court, as we have seen, had so decided, and this court might very well have treated that plea as presenting only a non-Federal question, and declined to give it any consideration, as it had done in the case of *Insurance Co.* v. *Tennessee*, *supra*. The importance attached by the lower court, in these cases, to the consideration of the plea of *res judicata* by this court in the *Douglass* case, does not seem to be warranted by the facts. (88 *Fed. Rep.*, 397–8.)

the board of managers is binding upon, and estops, the State. The learned counsel for the claimant, upon his argument in this court, has called our attention to no authority which sustains his claim that that judgment is *res judicata* against the State; and we know of no principle of law that gives it such force. The State was not a party to that proceeding, and the asylum managers did not represent it. The proceeding was one to compel them to discharge what was claimed to be a duty resting upon them under the law of their creation and the contracts into which they had entered. While they represented the State in making the contracts, they did not stand in the place of the State in any suit brought against them either for misfeasance or nonfeasance in the discharge of the duties devolved upon them by law. No provision is found in any statute giving them authority to represent the State in any litigation, or giving the consent of the State to be bound by any adjudication to be made against them. A State can not be sued in its own courts, except by its consent; and this rule is founded upon public policy of great importance, and it would be greatly impaired, and could be largely nullified, if the State could be bound by judgments rendered against its agents or officers. Such judgments may bind the officers, and compel them to discharge their duties, and thus frequently they enable claimants to obtain payment of their claims against the State and other rights to which they are entitled by law. But the adjudication in such actions never estops the State on the principle of *res judicata;* and so it has been frequently held."

On this principle the City of Louisville is not estopped from the collection of *ad valorem* taxes by civil action by a judgment in the prohibition proceedings instituted by the three banks mentioned against the Judge of the Police Court of the city. The judgment prohibiting the police court from proceeding further with the prosecution against said banks could have no greater weight or effect, under a plea of *res judicata*, than a judgment of acquittal had the guilt or innocence of the accused banks been determined upon a trial by the police court. Such a judgment might have been a good plea of *res judicata* in another prosecution on the same charge, viz: carrying on the business of banking without first paying a license fee of four per cent. on gross earnings, under the same ordinance, but it would not have been a good plea of *res judicata* in a civil action brought by the the city against the bank, so acquitted, to recover the amount of *ad valorem* taxes due the city for the same or a different period on the assessed value of its franchise or intangible property. Indeed, it is well established that an acquittal of a criminal or penal charge is no defense in a civil suit for the same matter.

In the case of *Mills* v. *City of Hopkinsville*, 11 *Ky. L. Rep.*, 164, cited by appellees' counsel, the Court of Appeals did not decide that the tax claim for 1887 was *res judicata*, but affirmed the judgment therefor in favor of the city because the domicile of the ward, whose personal estate had been assessed for taxes, was still in Hopkinsville, with her testamentary guardian, who was given the custody of her person. The court states that the parties were the same in the

first suit as in the last, the identical question was presented, the relief sought was the same in both suits, and on the same state of facts.

In *Keokuk & Western R. R. Co.* v. *Missouri*, 152 *U. S.*, 315, it was distinctly decided that "a suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action."

Again, in the same case, the court adhered to the principle announced in *Cromwell* v. *County of Sac*, 94 *U. S.*, 351; *Nesbit* v. *Independent Dist. of Riverside*, 144 *U. S.*, 610; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 *U. S.* 279, 302, and quoted with approval the decision of the Supreme Court of Iowa in *Davenport* v. *Chicago R. I. & P. R. Co.*, 38 *Iowa*, 633, which held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action, using the following language:

"'The cases,' said the court, 'are unlike those where two causes of action (as two prommisory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. *It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision.*'"

But for the recent decision in *City of New Orleans, &c.*, v. *Citizens Bank*, 167 *U. S.*, 371, decided May 24, 1897, the case of *Koekuk & Western R. R. Co.* v. *Missouri*, *supra*, would apear to be conclusive of the proposition that a judgment against the validity of a tax for one year is not a bar to a suit for the tax for a subsequent year. Much reliance is placed by appellees' counsel on this recent decision. But we insist that it does not sustain the claim of *res judicata* in these cases. On the contrary, it fully supports the contention we make for the City of Louisville, against the efficacy of the judgments in the prohibition cases brought by the Bank of Kentucky, Louisville Banking Company, and Third National Bank as *res judicata*. It is stated in substance in the opinion in that case, that the Citizens Bank's working capital was procured at its organization in 1833 by a loan from the State of Louisiana of its bonds amounting to seven millions of dollars, which were endorsed by the bank, and sold in open market. To secure the payment of these bonds the bank pledged all the notes furnished by its stockholders for the amount of their subscriptions, secured by mortgages on real estate and slaves. The State had an interest in the profits of the bank to a stated amount, and its affairs were conducted by a board partly appointed by the State and partly elected by the stockholders. The bank was, therefore, in a certain sense, a public or State institution. No attempt in a period of forty-

four years, or until 1877, was made by the State or any of its sub-divisions to tax it on its capital, shares of stock, or real estate and furniture actually used for carrying on its business. By an amended charter, passed in 1836, it was provided that the "capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter." The original charter expired in 1884. Its corporate existence was extended in 1874 to the year 1911. In 1886, the term of the original charter having expired, the Board of Assessors assessed the bank for State and city taxes for that year on its banking-house and on its shares of stock in the name of the shareholders to be paid by the bank.

In October, 1886, the bank filed its petition in the Civil District Court of the parish of Orleans, praying the annulment of this assessment, and making the Board of Assessors, the State Auditor, the City of New Orleans, and the State Tax Collector, parties defendant. The petition set out the charter of the bank, its non-liability to taxation thereunder, and the judgment of the Supreme Court of the State in the case of *Citizens Bank* v. *Bouny*, 32 *La. Ann.*, 239, was pleaded as *res judicata*. "Although there was a general averment in the petition that the tax was excessive, besides being illegal, there was no allegation contained therein adequate to justify or support the prayer that the assessment be annulled, *except the assertion that the property of the bank was exempt from taxation.*"

Of this suit this court states:

"After answer by the parties defendant, there was judgment on March 10, 1887, decreeing the assessment for the year 1886, standing against the banking-house on real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, assessed at seventy-five thousand dollars, and on 10,500 shares of the capital stock at $42.75 per share, aggregating an assessment of $448,875, null and void, and of no effect, and that the same be canceled and erased from the books of their respective offices, and that any inscription of the same in the mortgage office be canceled and erased, and costs of suit.

"This judgment was not appealed from, and on its becoming final an entry on the assessment roll was made canceling the assessment."

This court further states with reference to a second suit:

"On the 21st of March, 1887, a few days after the decision in the cause just stated, the Citizens Bank filed its petition in division A of the Civil District Court of the parish of Orleans against the Board of Assessors. In this petition, after averring that under its charter the bank was not liable to assessment and that it could not be taxed without impairing the obligations of the contract created by the charter and in violation of the Constitution of the State and of the United States, the petitioner proceeded to aver the previous judicial recognition of the effect of the charter, and alleged that, notwithstanding these facts, the Board of Assessors were about to assess the bank for the taxes of 1887 upon its shares of stock, upon its banking building, and upon the furniture therein used by petitioner for conducting its said banking business and upon other property possessed by peti-

tioner, that said proposed assessments were without warrant of law, and the bank was entitled to enjoin the making of the same. A preliminary injunction having been issued as prayed for, the case was put at issue, and resulted in a judgment, on the third of May, 1887, perpetuating the preliminary injunction, and enjoining the Board from 'assessing the Citizens Bank for taxes, State or city, for the year 1887, upon its capital stock, on the shares thereof, or its property, and that said assessment, if made, be canceled from the books of the Assessor for the year 1887, and that the Recorder of Mortgages for the parish of Orleans be and he is hereby enjoined from recording said assessments upon the books of his office.' This judgment was also not appealed from, and upon its becoming final was executed by proper entry on the books of the Recorder of Mortgages."

The prayer in the petition in this last action was as follows:

"Wherefore petitioner prays that said board of assessors for the parish of Orleans and the City of New Orleans be duly cited to answer this petition; that, considering the bond and affidavit herewith filed, a writ of injunction issue, directed to said board, enjoining them and prohibiting them and each member thereof from assessing the Citizens Bank for taxes, city or State, for 1887, *or for any subsequent year*, upon the capital stock of the Citizens Bank or the shares thereof, or upon the banking building of petitioner or upon the furniture used therein, *or upon any other property of petitioner;* that said injunction be made perpetual, and that said board and the recorder of mortgages be prohibited and enjoined from recording any such assessments in the office of the recorder of mortgages and for general relief."

After this second judgment no further assessment was made or attempted until 1892, when the bank filed its bill in the United States Circuit Court for the Eastern District of Louisiana against the City of New Orleans, the Board of State Assessors for the parish of Orleans, and the State tax collectors for the various collection districts in said parish, and its supplemental bill against the sheriffs of thirteen other parishes, praying for an injunction enjoining the board of assessors from assessing the bank for the years 1889, 1890, 1891, and 1892, and the collectors from collecting any taxes thereunder. The bill alleged that the bank was contractually exempt from State and municipal taxation under its charter. This court states:

"Besides alleging the contractual exemption resulting from the charter, the bill averred that the fact of such exemption was conclusively determined by the presumption of the thing adjudged resulting from judgments previously rendered between the parties. The bill also averred that an attempt to enforce the assessment and tax would impair the obligations of a contract protected by the Constitution of the United States, the rights asserted by the bank under the Federal Constitution being specially set up and claimed in the complaint."

Notwithstanding the petitions in the State court alleged an exemption from all forms of taxation, State or city, on said bank, its capital stock, shares of stock, real estate, and *other property;* and the judgments in that court, particularly that in the second suit, specifically

adjudged such exemption existed in as broad terms as was claimed by said bank, this court gave only partial effect to said judgments, under the plea of *res judicata*, and rejected the same as conclusive on the question of exemption from State or city taxes as claimed and adjudged in the Circuit Court of the United States. The latter court had followed the allegations and prayers of the petitions, and the terms of the judgments, holding that "the thing adjudged" in the State court was total exemption on all of said bank's property. This court held that was error, and that nothing was exempt except the subjects of taxation actually involved and specifically mentioned in said suits in the State court, which had been or were about to be assessed when said suits were instituted. That is all we ask here for the City of Louisville; and if that is done, the exemption will be confined to a license tax, or occupation tax, the only subject of taxation involved in the prohibition suits.

After quoting from the language of the final decree of the Circuit Court in favor of the bank, this court gives a summary of the objects of taxation on which that decree adjudged the bank was entitled to exemption as follows:

"The exemptions to which the decree below held the bank to be entitled, related therefore to distinct objects of taxation, one not necessarily connected with or dependent upon the other, and may be summarized as follows: First. That the bank was not subject to taxation on its capital, shares of stock, or real estate and furniture actually used for the carrying on of its banking business, and that the bank could not be lawfully obliged to pay the sum of any tax assessed on its shareholders. Second. That the stockholders of the bank were not liable for assessment on their shares of stock. Third. That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions and had become the property of the bank under foreclosure proceedings, because property so acquired became, by virtue of the purchase, a part of its capital stock. Fourth. That the non-liability of the bank to taxation embraced also immunity from the payment of a *license* tax to either the State of Louisiana or the city of New Orleans."

Then this court proceeds to state the contentions of the parties on the appeal as follows:

"The contentions which arise between the parties on this appeal from the decree below rendered are as follows: First. The bank asserts that by the effect of its charter it was contractually exempt from taxation on all the foregoing objects of taxation; that this exemption existed not only during the terms of the original charter, but during the term for which the charter was extended. The contract being asserted to result, not only from the express terms of exemption in the original act, but from the fact that the very nature of the contract between the bank and the State carried this exemption into the period of the extended charter, as the bank and its capital was dedicated to the payment of the bonds, outstanding obligations of the State, and the bank was, therefore, in a measure, a *quasi* State institution. Second. That the contractual right to the exemption as

above stated is conclusively determined by the presumption of the thing adjudged, resulting from certain judgments relied upon.

"On the other hand, the contention of the defendants is that the exemption did not originally obtain, or, if it did, was not carried into the extended period of the charter, because it could not be so carried under the Constitutions of the State of Louisiana of 1868 and 1879, by which the bank was bound, and that the judgments relied on and which were offered in evidence do not constitute 'the thing adjudged.'"

After the decision in the Circuit Court, and pending the appeal, the bank brought suit in the State court to prevent the assessment and taxation of its real estate acquired by it under foreclosure of its stock mortgages, and this court speaks of that litigation as follows:

"Certain judgments rendered in favor of the bank (presumably those relied upon in this record) were set up as constituting *res judicata*. The court of last resort of the State said, in its opinion on the first hearing, that it was unnecessary to pass upon the plea of the thing adjudged, since the judgments relied upon did not embrace the question of whether property bought by the bank under foreclosure of its stock mortgages was included within its exemption. The court held, considering the terms of the charter, that such property was not included in the exemption. In that case both the act of 1880, above referred to, and the act of 1874, were set up as conclusively establishing that the bank was not exempt from taxation at all. In an opinion on a rehearing the court somewhat modified the grounds for its conclusions, and in the course of the opinion said:

"'We refrained from stating the effects as to the taxation of the bank's capital in consequence of act 79 of 1880. We now do the same, because we think it unnecessary to do so. We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered.'

"In concluding the opinion the court said:

"'We think the Citizens Bank has heretofore obtained all that it is entitled to, the exemption from taxation of its capital proper and the real estate necessary for carrying on its legitimate business or purposes.' (*State ex rel. Citizens Bank* v. *Board of Assessors*, 48 *La. Ann.*, 35.)"

It will be observed that this court, in said opinion, expressly passes the consideration of the correctness of the decisions of the State courts and the influence they should have upon this court "in interpreting a purely Louisiana contract," and proceeds to consider the case under the plea of *res judicata*. "In considering this question," this court states, "we at once eliminate all the judgments rendered prior to the period when the *amended charter* took effect, and therefore confine our examination to the two judgments rendered by the Civil District Court, the one as to the taxes of 1886, and the other as to those of 1887."

In commenting on these two judgments, the court lays stress on the *nature of the relief* sought by the bank and the *terms of the judgment* as of vital importance in ascertaining what was *the thing adjudged*.

We now approach the conclusion of the court as to the extent and effect given to the plea of *res judicata*, as follows:

"The only question then remaining to be determined is, to what *subjects of taxation* does the estoppel of the thing adjudged apply, for it extends only to the matters which are *necessarily* concluded by the judgment. It is clear upon the face of the records and judgments which are relied upon to constitute *res judicata* that the only questions therein presented and decided were the non-liability of the bank for taxation on its capital, its banking-house, and furniture acquired for the purposes of its banking business, and to a tax levied *eo nomine* on its shareholders, with obligation imposed by the taxing law on the bank to pay the tax. These items, however, embrace only the subjects of taxation mentioned in the *first* of the enumerations which we at the outset made, and do not include the objects embraced in the other three. The thing adjudged, therefore, on the face of the records and judgments does not conclude three of the general subjects of taxation as to which the court below decreed the bank not liable for taxation. The argument, however, is that although the objects embraced in the last three headings are not apparently within the estoppel resulting from the thing adjudged, they are nevertheless substantially so, for it is said that as the thing adjudged determined that *the bank under its contract can not be taxed*, the principle thus established carried the other items with it. The contention is *unsound*, and to demonstrate that it is we will examine briefly the three items referred to, which are embraced in the second, third, and fourth headings."

The court then excludes the following three objects of taxation as not embraced by the plea of *res judicata*, erroneously held to be exempt by the court below, to-wit:

1. The stockholders of the bank on their shares of stock.
2. The real estate held by the bank, which had been mortgaged to secure stock subscriptions or stock loans and had become the property of the bank under foreclosure proceedings.
3. A license tax either to the State of Louisiana, or the City of New Orleans.

On this last item and in conclusion the court states:

"We are at a loss to understand by what process of reasoning the decree was made to cover the question of the non-liability of the bank for license. It was not presented by the pleadings, and was entirely *de hors* the issues of the case.

"As we concluded that the decree below was in part erroneous we must reverse it. The decree below is therefore reversed, and the case remanded with the following directions: First, to enter a decree in favor of the Citizens Bank, recognizing and enforcing its non-liability to taxation, State, parochial, and municipal, on its capital stock, its banking house and furniture acquired and used for the purposes of its banking business, and on a tax on its shareholders *eo nomine*, accompanied with a legal obligation on the bank to pay the tax. Second, rejecting the claim of the bank to non-liability of its shareholders for taxation without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them

unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana. Third, rejecting the claim of the bank to non-liability to taxation on the property acquired by it under foreclosure of mortgages—the whole without prejudice to the right of the State and municipal authorities to claim a license tax, should such be imposed by law on the bank, and without prejudice to the right of the bank to assert any legal defenses which it may have to the payment of such license tax, and it is so ordered."

It will be observed that Justices Fuller, Brown, and Peckham dissented from this opinion (which was delivered by Justice White) on the ground that the judgments relied on by the appellee bank were not *res judicata*, although in other respects they concurred.

But we invite the court's attention to the fact that, although the language of the charter in that case provided in the most comprehensive manner that "the capital of said bank shall be exempt from *any* tax laid by the State, or by any parish, or body politic under the authority of the State, during the continuance of its charter;" and to the further fact, that notwithstanding the repeated decisions of the State courts upholding the exemption claimed from *all* taxation in various suits brought by the bank to prevent the collection of taxes from it on its capital stock and *other property*, and on the shares owned by its stockholders, as well as to cancel assessments made thereof from time to time, this court, when it comes to apply and give effect to the plea of *res judicata*, confines the same to *the narrowest limits possible*, and refuses to extend it beyond the *very letter of the judgments relied on, strictly construed.* The judgment of the court below was reversed because the exemption was carried too far. It was distinctly held that the exemption of the bank itself did not exempt from taxation the shareholders on their shares of stock, and that the bank could not champion the rights of its stockholders in a bill filed by the bank alone. Furthermore, the real estate acquired by the bank under foreclosure proceedings was decided to be not exempt as forming part of the capital stock. Only the real estate actually used for carrying on the business of the bank was adjudged to be exempt from taxation. In addition to these exclusions, the plea of *res judicata* based on judgments, wherein "the thing adjudged" was the bank's exemption from *ad valorem* or *property* taxes, was held to be no bar to a claim by the State or City of New Orleans to a *license* tax on its *occupation.*

So in these cases, the state of facts being reversed, it follows inevitably, it seems to us, that the plea of *res judicata* based on judgments, wherein "the thing adjudged" was the bank's exemption from, or, more aptly speaking, non-liability for, a *license* fee or *occupation* tax imposed by an ordinance of the city, passed under the act of July 1, 1893, must be held by this court to be no bar to the recovery by the city of *ad valorem* or *property* taxes against the same banks assessed for such taxes by the State board under the act of November 11, 1892.

The opinion in the case of *New Orleans* v. *Citizens Bank*, does

not sustain, but is authority against, the plea of *res judicata* as presented in the bills of the complainants in these cases.

In the petitions in the three suits brought by the Bank of Kentucky, Louisville Banking Company, and Third National Bank against R. H. Thompson, Judge of the Police Court of the City of Louisville, it will be observed on examination each of said banks, by reason of its acceptance of the provisions of the Hewitt Act of May 17, 1886, claimed that it and its shares of stock were exempt from municipal taxation, during its corporate existence, except on the real estate or building owned and used by it in conducting its business, and the relief prayed for is that further proceedings in the prosecution of the warrant issued from said police court against it for failing to pay a *license* tax be prohibited, and that (1) the license ordinance of January 29, 1894; and (2) the act of July 1, 1893, for the government of cities of the first class, in so far as they authorize a tax in any form to be levied against and collected from it, be declared unconstitutional and void. (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 78–83; *Record No.* 360, *Stone, et al.* v. *Louisville Banking Company*, 16–20; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 27–21). The judgments in these three actions are all in the same form, and the only relief adjudged in each case is that said defendant, judge of the police court, be and he is prohibited from proceeding further with the warrant mentioned in the petition against the plaintiff bank in said police court, or making any further order therein. (*Record No.* 356, *Stone, et al.*, v. *Bank of Kentucky*, 88–9; *Record No.* 360 *Stone, et al.* v. *Louisville Banking Company*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57.) It was not adjudged specifically in said three cases that the plaintiff bank had an exemption from all municipal taxes, ad valorem as well as license, on the bank itself, its capital stock, surplus, franchise, or property of every kind, except the real estate or building owned and used by it in conducting its business. The character or extent of the exemption was not determined or defined by the court in its judgment. The result is, when the judgment rendered is pleaded as an estoppel, it can not be held to be conclusive, except as to a *license* tax on the occupation or business of the plaintiff bank, because that was the only "subject of taxation," or subject-matter of the action in which said judgment was obtained. In other words, the rule established in *New Orleans* v. *Citizens Bank*, *supra*, will be followed.

But the court below in these cases (which were all, with others, heard together), while expressly holding that there was no irrevocable contract between the banks and the State by reason of the acceptance by the banks of the provisions of the Hewitt Act, and that the scheme of taxation in that act was repealed by the revenue act of November 11, 1892 (*Northern Bank v. Stone, &c.*, 88 *Fed. Rep.*, 413), in order to avoid the force of the argument founded on this court's decision in *New Orleans* v. *Citizens Bank*, *supra*, that a judgment pleaded as *res judicata*, adjudging that a bank was exempt from *ad valorem* taxes on its *property* did not preclude the imposition of a *license* tax on its *occupation*; and, therefore, a judgment pleaded as *res judicata*, that a bank was exempt from a *license* tax on its *occupation*

did not prevent the imposition of an *ad valorem* tax on its *property*, undertook to institute a comparison between the language used in the charter of the Citizens Bank of New Orleans and that used in the Hewitt Act, and to construe the scope and effect of the latter as an original question, so as to embrace both property and license taxes. On this point the following quotation is made from the opinion of the court below (*Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 395:

"The case of *City of New Orleans* v. *Citizens Bank of Louisiana*, 167 *U. S.*, 371, is relied on to support the contention that a judgment that a license tax violated the bank's contract of exemption can not be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the City of New Orleans case the language of the exemption was: 'The capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter.' It was held that a judgment holding this to be a valid exemption, and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders, or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract, so as to exempt capital and business property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock, and upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt Act is that 'such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.' If this exemption clause is irrevocable, it

certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable, and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, *a fortiori*, does it prevent a direct tax upon its property, tangible and intangible. The tax imposed by the revenue act of 1892 was called a 'franchise tax,' but it has been held, both by the Supreme Court of the United States and the Court of Appeals of Kentucky, to be in fact anything but an *ad valorem* property tax. *Henderson Bridge Co.* v. *Kentucky*, 166 *U. S.*, 150; *Adams Exp. Co.* v. *Kentucky*, 166 *U. S.*, 171; *Henderson Bridge Co.*, v. *Com.*, 99 *Ky.* 623."

We submit that when the lower court states: "If it (the exemption clause) prevents a license tax, *a fortiori*, does it prevent a direct tax upon its property, tangible and intangible," it is simply arguing the question of construction, or what the State court *might have decided*, in a case involving *property* taxes, not what it *had in fact decided* in a case involving a *license* tax only.

A brief filed at a hearing in this court by one interested in the question to be decided, does not make him a party to the suit, or bind him, or estop him, by the decree.

In *Stryker* v. *Goodnow*, 123 *U. S.*, 540, this court said:

"We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the railroad company to support the claim of Walcott that the title of that company was the best. Such a proceeding did not make the railroad company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own claims in any litigation that might thereafter arise in respect to its own property. It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided; and it has never been supposed that the judgment in such case would estop the intervener in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit."

In the case of *Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413, the lower court held that the fact that, in a suit to restrain a county from enforcing collection of a tax under a State law, the Attorney General of the State appeared and argued the case orally and by brief in the Court of Appeals in behalf of the State, which was not a nominal party to the record, did not make the adjudication *res judicata* as against the State, using this language:

"The Attorney General of the State in these cases, in appearing in the Court of Appeals of Kentucky, for the county of Bourbon, did not intend to waive any rights of the State, and, so far as appeared, he had no authority to do so;" and cited *Carr* v. *United States*, 81 *U. S.*, 433. So we insist here, the appearance by former City Attorney Barker in the Court of Appeals for the City of Louisville, which was not a party to the record in the prohibition suits in the court of original jurisdiction, did not intend to waive any of the rights of the city, and, so far as appeared, he had no authority to do so.

In *Richardson* v. *City of Boston*, 19 *How.*, 263, this court confined the operation of an estoppel to questions of *fact* and said:

"But estoppels, which preclude the party from showing the truth, are not favored. To give the verdict the effect of an estoppel, the *facts* must be distinctly *put in issue.*"

Now, the facts alleged in the prohibition suits concerning the acceptance by the plaintiff banks of the Hewitt Act, were not put in issue at all, but distinctly admitted by the demurrer of the defendant. The only question controverted was one of law, whether or not the Hewitt Act as to bank taxation had been repealed. The three banks in their petitions alleged that act had not been repealed, and that their contracts thereunder were irrepealable. The demurrers to said petitions put in issue that question of law only and rested on the affirmative proposition that said act had been repealed. The decision of the Court of Appeals of June 1, 1895, on this issue of law, holding that the Hewitt Act, with respect to the taxation of banks, had not been repealed, simply construed the provisions of that act. The construction then announced was subject to be overruled by the same court at any time thereafter. It was overruled March 24, 1897; but the former adjudication, having involved no question of fact, but only one of law, neither the State nor the City of Louisville is estopped thereby from claiming the right to an enforcement of the tax provisions with respect to banks of the general revenue law of 1892, against those banks that were parties to the cases first determined.

By Section 905 of the Revised Statutes of the United States, it is provided, with respect to the effect to be given to the judgments of a State court:

"And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State* from which they are taken."

Under this section the Federal courts are not required to give any greater effect to a State court judgment than is given to a like judgment by the highest court in such State.

In *Douglass* v. *Pike County*, 101 *U. S.*, 688, this court said:

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Here, however, the decision of June 1, 1895, of the Court of Appeals of Kentucky, construing the Hewitt Act, with respect to banks that had accepted its provisions, did not continue in force quite two years. If the change resulting from judicial construction, which came with the decision of said court, March 24, 1897, is to have the same effect "as an amendment of the law by means of legislative enactment," it becomes important to ascertain what effect a

change in the law has upon the judgment of a Kentucky court, when pleaded as *res judicata* by a party claiming a tax exemption, as declared by the highest court of that State.

Prior to the passing of the decrees appealed from in these cases, the Court of Appeals of Kentucky, May 13, 1898, in an opinion, which is to be officially reported (*City of Newport* v. *Masonic Temple Company*, 45 *S. W. Rep.*, 881), decided the question as to what effect is to be given to a judgment in that State in a suit for taxes for prior years, when pleaded as *res judicata* in a suit for taxes of subsequent years claimed by a municipality under a different statute, or change in the tax laws. In that case the City of Newport, in 1892, brought suit against the Masonic Temple Company for the taxes due for the years 1887 to 1891, to which said company pleaded its charter exemption, which the court sustained, and dismissed the petition. Subsequently the city brought suit against said company for the taxes of 1892 and 1893. The former judgment was pleaded as *res judicata*, and the lower court adjudged this plea good, and dismissed the action. On the city's appeal from the last judgment, the Court of Appeals held that after the accrual of the taxes involved in the first suit, the State Constitution of September 28, 1891, had repealed said company's charter exemption. In the opinion reversing the judgment of the court below, the Court of Appeals said (*Ib.*, 882):

"Two of the elements which were essential to make the matter *res judicata* are lacking in this case: (1) The identity of the subject-matter; (2) the identity of cause of action. The question for the consideration of the court in the former case was as to whether the provisions of the appellee's charter exempted it from taxation for the years stated in the petition. The cause of action was the taxes which were alleged to be due for those years. The cause of action alleged in the case under consideration is a claim for taxes for different years, and the matter to be adjudged is the question of appellee's liability therefor *under the law now in force* for certain other years."

We insist that when these cases were brought and decided, the laws of the State of Kentucky pertaining to the taxation of banks, as they were interpreted and understood June 1, 1895, had been changed by the judicial construction of the highest court in the State, March 24, 1897, and when the question of exemption from other demands, or the taxes of subsequent years, upon the plea of *res judicata*, was presented for decision in the court below, it was not "under identically the same facts and circumstances" as in the previous litigation. The former adjudication, therefore, did not constitute an estoppel.

The utmost extent to which the exemption claimed by the banks that were parties to the litigation determined June 1, 1895, could be carried (and we do not concede that) is from the taxes which accrued prior to March 24, 1897.

We suggest that the attitude of these institutions is not such as to incline this court to enlarge the scope of their plea of *res judicata*, in any event, beyond the limits indicated. Indeed, the same strictness of construction applies and should be observed in construing a judgment pleaded as *res judicata* to establish a tax exemption as is em-

ployed when this court is called on to construe a statute under which a like immunity is claimed. If there be a doubt as to whether the former adjudication constitutes an estoppel, or upholds the right to the tax exemption as claimed during the corporate lives of these institutions, we submit that such doubt ought to be resolved by this court against the existence of such an immunity, and in favor of the principle of equality in the imposition of public burdens by both city and State.

IV.

PLEA OF RES JUDICATA BY BANKS AND TRUST COMPANIES CLAIMING AS PRIVIES TO THE BANKS THAT BROUGHT PROHIBITION SUITS.

If our contention be sustained by this court that the three banks which actually instituted the prohibition suits against the Police Court of the City of Louisville to prohibit the prosecution against them for failing to pay a license tax under the ordinance of January 29, 1894, have no available plea of *res judicata* against the collection of *ad valorem* taxes by the State and City of Louisville, then it follows, as a matter of course, that none of the other banks and trust companies can rely on the plea of *res judicata*. But, even if the judgments rendered in the suits of the Bank of Kentucky, Louisville Banking Company, and Third Natioal Bank bar the right of the State or city to collect *ad valorem* taxes during the corporate existence of said three banks respectively, the facts alleged in the bills of the other banks and trust companies are not sufficient, if true, to constitute a good plea of *res judicata*, or to prevent the collection of *ad valorem* taxes from them by the State or city.

The warrants taken out by the Commissioners of the Sinking Fund for carrying on the banking business without paying the license tax therefor were against the three banks mentioned—not against all the banks and trust companies. There was no pending litigation against any but the said three banks, when it is alleged an agreement was made with respect to the liability of the banks to pay a license tax under said ordinance. The exhibit marked "A," and made part of complainants' bills, is in two parts. (*Record* 362, *Stone, et al.* v. *Bank of Commerce*, 12–15). The first is in the form of a motion adopted by the Commissioners of the Sinking Fund under date of February 13, 1894. The second consists of what purports to be a stipulation, *without date*, setting forth what is stated *to have been* agreed on in February, 1894, and is signed by counsel for the banks, trust, and title companies of the City of Louisville, and by the City Attorney, and approved by the President of the Commissioners of the Sinking Fund of the City of Louisville. *When* this stipulation was so signed, whether before or after the decision of the Court of Appeals of June 1, 1895, is not alleged or disclosed in any of the complainants' bills. It appears that the Mayor did not sign said stipulation, and it is not alleged that the General Council approved it. It was not filed or made part of the record in either of the three suits brought.

The copy of the proceedings of said Commissioners on February 13, 1894, attested by their secretary, constituting the first part of said exhibit "A," shows said proceedings related to nothing whatever except the validity of the license ordinance of January 29, 1894, and the liability of the banks, trust, and title companies to pay the license fee thereby imposed. No question of irrepealable contract with the State, or immunity from all municipal taxation is presented in these proceedings of February 13, 1894, from beginning to end. Pending the controversy over the payment of the license fee, the banks (with two or three exceptions), it appears from said proceedings, were willing to pay part of the license fee and loan the Sinking Fund the balance thereof, to be repaid with interest at 4 per cent. per annum, "if it was finally decided the banks were not liable to pay said license fee." So, said Commissioners authorized their their president to enter into an arrangement with the banks, trust, and title companies whereby the Sinking Fund was (1) to accept the difference between the amount they then paid to the State for State taxes (42½ cents on the $100), and the amount they would pay under the Hewitt Bill, which difference so paid (32½ cents on $100) was to be an actual payment, not to be refunded under any circumstances; and (2) in addition to making this absolute payment, the banks and trust companies (except those selected to test the question involved) were to lend the Sinking Fund a sum which, when added to such absolute payment, would equal the amount of said license fee against them respectively, for which loan the Sinking Fund was to execute its notes bearing 4 per cent. interest per annum, due when said license fee should be decided to be invalid, or if it was decided to be valid, said notes were to be void. The banks selected to test the question involved (liability for said license fee) were each to lend the Sinking Fund a sum equal to the license fee against it, or 4 per cent. of its gross earnings for the year 1893, and receive therefor, the obligation of the Sinking Fund, as above described. Whether any written agreement was ever formally entered into between the Sinking Fund by its President and the banks, trust and title companies in pursuance of the authority conferred in the motion adopted February 13, 1894, by said Commissioners, does not appear from the records in these actions. If it be pretended that the undated agreement, or stipulation, of which a copy is made the second part of exhibit "A" with complainants' bills, was entered into as a compliance with the authority conferred as aforesaid, then we insist it far exceeds the authority undertaken to be granted by the Commissioners of the Sinking Fund, and bears on its face the ear-marks of an agreement whose covenants were framed in the light of the decision of the Court of Appeals of June 1, 1895, and in all probability to form the basis of a plea of *res judicata* in the event that decision was subsequently overruled. In other words, it is apparently the result of an *afterthought*. It only purports to be a recital of what is stated to have been theretofore agreed upon. It is not an agreement *in presenti*. When this agreement was reduced to writing is not made clear by the testimony taken by the banks. Its caption states that it is an agreement between "the City of Louisville, the Commissioners of the Sinking Fund,

represented by H. S. Barker, City Attorney, acting under the advice and by the authority of the Board of Sinking Fund Commissioners given at a regular meeting of said Board, and the Mayor of the City of Louisville, on the one part; and the various banks, trust, and title companies of the City of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, on the other part." Now, the City of Louisville had not, by its General Council or Mayor, authorized any agreement whatever, on the subject-matter embodied in said alleged stipulation, nor had the Sinking Fund Commissioners in their proceedings of February 13, 1894. Although the City of Louisville and the Mayor are both stated therein to be parties to said stipulation, it shows that neither executed it. The Mayor did not sign it for the city, and his name is not subscribed thereto at all. The City Attorney, in signing the same, only represented the Commissioners of the Sinking Fund, as is stated in the outset of said stipulation, "under authority given at a regular meeting of said board." But this is a mistake if it refers to the meeting of February 13, 1894, (and no other is alleged or proven to have been held on the subject), for in that meeting, the president—not the attorney—of the board was authorized to enter into an agreement, and that embraced only the question as to the validity of the *license fee* against banks, trust, and title companies, under the ordinance of January 29, 1894. But the undated stipulation, without authority from the Sinking Fund even (much less from the General Council), states "that in February, 1894, it *was* agreed between the City of Louisville and the Board of Sinking Fund Commissioners, acting together, in the interest of the said city; and the various banks, trust, and title companies, acting through their committee and counsel, that the question of the liability of said banks, trust, and title companies to pay *municipal taxes, either license, or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt Bill, should be tested by appropriate litigation looking to that end.*" We undertake to say, from the record, that no such general question was involved, nor was there any such agreement made by the city acting by itself or in conjunction with the Commissioners of the Sinking Fund. The bills must be construed most strongly against the complainants. Had there been any corporate act done by the city in the way of a resolution of the General Council, or otherwise, with respect to the question of the liability of the banks and trust companies "to pay municipal taxes, either license or *ad valorem*, otherwise than as provided in the Hewitt Bill," it would have been alleged specifically by complainants, and a copy of the record of such corporate action by the city would have been filed as an exhibit with the bills. But no such corporate action by the city was taken and no such record is in existence. Judge Barker so testifies. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 48, *Question and Answer on Cross-Ex. No.* 36.) The only step taken of record was by the Sinking Fund on February 13, 1894, and that did not pertain to or mention the question of the liability of the banks for municipal taxes generally, or for *ad valorem* taxes, under the Hewitt Act, or otherwise. Indeed, the Sinking Fund had no control over *ad valorem* taxes. Nothing it might do concerning such

taxes was of any binding force or effect upon the city. All *license* fees, however, were payable to the Sinking Fund. (*Secs.* 2980 *and* 3011, *Ky. Stats.*) After setting out the alleged agreed classification of the banks into three classes, this document called a "stipulation" contains the following remarkable clauses:

"It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt Bill, that all of that class should *thereafter regularly and promptly submit to the existing laws and pay their taxes.* And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt Bill that *that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt Bill.*" (*Record* 362, *Stone et al.* v. *Bank of Commerce*, 14.)

This alleged arrangement is unique, to say the least of it. If any bank in any class lost its suit, all of that class promised to "thereafter regularly and promptly submit to the existing laws and pay their taxes." This was indeed a great concession (?). The losing banks simply undertook to "submit" to the existing laws (when they were compelled to do so); and to pay their taxes thereafter "regularly and promptly," and thus wisely avoid the payment of interest and costs.

Again, according to this stipulation, it *was* agreed (*when* or by *whom* is not stated), that, if any bank of any class succeeded in establishing the validity of a contract under the Hewitt Bill, "*that* should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt Bill." How long this exemption (?) was to last, or what is meant by "except as provided in the Hewitt Bill," are matters left to conjecture. There is no provision for a judgment to be rendered fixing the right to or extent of such exemption, or that the non-suing banks should be entitled to the benefits and the judgments obtained by the suing banks. But had this so-called stipulation been executed in the most solemn manner possible by the Mayor, for and on behalf of the City of Louisville, under a resolution directing him to do so, adopted by the General Council, it would have been *ultra vires* and not binding on the city. The "act for the government of cities of the first class" grants no power to the City of Louisville to exempt any person or corporation from taxation. An attempt to do so by ordinance or resolution of the General Council, approved by the Mayor, would have been unconstitutional and void. The Sinking Fund Commissioners had no power to exempt any person or corporation from the payment of any kind of municipal taxes of the City of Louisville. The existence of any such power to exempt from taxation, in either the city or Sinking Fund, is not alleged in any of the bills.

It is alleged, however, that the banks and trust companies relied on this alleged agreement, and paid to the Sinking Fund the amounts of the license fees against them under the terms and conditions

named in the minutes of the Board of Sinking Fund Commissioners of February 13, 1894, and *at a later date* all of the banks and trust companies, except the three banks which brought suits, *paid* to the Sinking Fund the whole of said license fees, without reservation, until the final decision in the suits brought by said three banks. If these license fees were paid voluntarily and without reserve, as alleged, they can not be recovered from the city or Sinking Fund, but if paid involuntarily, or to avoid the fine fixed in said license ordinance, they can be recovered from the Sinking Fund, or the city will be required to give credit therefor on tax bills made out under the *ad valorem* system. (*Levi* v. *City of Louisville*, 97 *Ky.*, 394.) There is no legal or moral weight, therefore, to be attached to the allegation that the amounts thus paid to the Sinking Fund were over $150,000, and that no part of the same has been refunded by the city. It is not alleged that any demand has been made or suit brought by any bank or trust company therefor. But it appears from Judge Barker's testimony that four of the banks that paid license taxes for the years 1894 and 1895 brought suits against the Commissioners of the Sinking Fund, and that they were still pending when he gave his deposition. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 53, 60–63.) The city is solvent, and ready to abide by the law and the judgment of the court with respect to the license fees paid by the banks and trust companies. It would be an excellent bargain for the complainant banks and trust companies to obtain exemption from all municipal taxes during the remainder of their corporate lives by the payment to the Sinking Fund of $150,000, or the amount of said license fees for two years, under the ordinance of January 29, 1894. The city, however, instead of making a profit, as complainants' counsel intimate, would be greatly the loser.

This alleged stipulation, conceding for the sake of argument that it was duly made, does not establish the plea of *res judicata* in behalf of the complainants which brought no suits. It is not an agreement that the *judgment* in one suit shall be entered as the judgment in another or other suits. There were but three suits instituted. Hence the judgments in them could not be entered in others which had no existence in court At most this stipulation, if the facts attending the same, as alleged, were all conceded to be true, instead of constituting *res judicata*, would only be in the nature of an estoppel, or matter of defense, in a suit by the city. No Federal question is raised by the state of facts alleged connected with this stipulation. If it be true, as the court below decided, that no irrepealable contract was made with the State by the banks that accepted the provisions of the Hewitt Act, then such banks had no contract, the obligation of which was impaired by any *legislative* act of the State of Kentucky. A denial by the city of facts which, if true, would estop it from collecting municipal taxes from the complainants, can not be tortured into a contract. The State courts alone, as we have already seen, have jurisdiction of such a controversy. But even if this stipulation constitutes a contract between the city and the banks and trust companies, complainants do not allege that its obligation has been im-

paired since its execution by any State *legislation* violative of the Constitution of the United States.

The sections of the "act for the government of cities of the first class," with respect to the duties and powers of the Mayor and City Attorney, cited by complaidants' counsel, do not sustain the validity of the alleged agreement and stipulation. The Mayor is given no power, in causing the *ordinances* to be enforced, to bargain away the constitutional and statutory right of the city to collect its revenues from these moneyed institutions during their corporate existence; nor is it shown that ex-Mayor Tyler undertook to do so, or was a party to the alleged stipulation. Although he was alive when this document was executed, he did not, for some reason, sign it. He had ample opportunity to do so, for his death while Mayor did not occur until January, 1896. (*Record No.* 362, *Stone, et. al.* v. *Bank of Commerce, Barker's dep.*, 49–51).

While it is the duty of the City Attorney "to *prosecute* and *defend* all *suits* for and against the city," he has no power under section 2909, Kentucky Statutes, to compromise the corporate rights and powers of the city by agreeing that certain corporations (especially where there was no suit pending for or against them) should be thereafter *exempt from municipal taxes*, provided judgment was rendered in favor of similar corporations in actions pending between them and the city. (*Holbert* v. *Montgomery*, 5 *Dana*, 13; *Smith* v. *Dixon*, 3 *Met.*, 442; *Forbes* v. *Hamilton, Sneed* (*Ky.*) 90; *Lexington & Carter Mining Co.* v. *Welburn*, 11 *Ky. L. Rep.*, 307; *Holker* v. *Parker*, 7 *Cranch* (11 *U. S.*), 36).

The section referred to (2909, *Ky. Stats.*) constitutes the only statutory authority vested in the City Attorney to represent the City of Louisville in litigation for or against it. That section is as follows:

"There shall be elected by the General Council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the Mayor and members of the General Council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the General Council. His salary and term shall be fixed by the General Council, not to exceed four years."

We agree with the court below that "the foregoing section makes this officer the retained attorney of the city in every *suit* brought against it;" but we can not assent to the proposition that his authority to represent the city extended to the making of an arrangement with "intended litigants" that they should have the benefit of judgments in the suits brought by others. Had the suits been actually instituted, we concede he had authority to enter into an arrangement to save costs and unnecessary expense by which the judgment in one suit against the city should be entered in others involving the same question or subject-matter. This management of the litigation comes under the general authority of an attorney retained in a num-

ber of suits actually pending, and such a stipulation has frequently been upheld and carried into execution by the courts. The authorities cited by the lower court on this point, all of which we have examined, go to this extent, but no further. (*North Missouri R. Co.* v. *Stephens*, 36 *Mo.*, 150; *Ohlquest* v. *Farwell*, 71 *Iowa*, 231; *Eidem* v. *Finnegan*, 48 *Minn.*, 53; *Gilmore* v. *Insurance Co.*, 67 *Cal.*, 366; *Patton* v. *Caldwell*, 1 *Dall.*, 419; *Thompson on Trials*, *vol.* 1, *sec.* 195.)

We do not dispute the proposition that a binding agreement of the character mentioned may be made by the parties affected themselves, or by their retained attorneys acting under a special authority. In such case others who join in such an agreement may become privies to those who are parties to the record in the suit, and be bound by or entitled to the benefit of the final judgment therein.

"Those dealing with the corporation (the City of Louisville) through its officials are bound to take the same notice of its laws and ordinances that a citizen of the State is with reference to legislative enactments. * * The fact that the writing was not presented to or approved by the council is conclusive that no contract was made." (*Murphy* v. *City of Louisville*, 9 *Bush*, 189)

The alleged stipulation, made part of complainants' bills, shows there were no warrants taken out by the Sinking Fund Commissioners for a violation of the license ordinance of January 29, 1894, except against the Bank of Kentucky, Louisville Banking Company, and Third National Bank. There was, therefore, never any pending litigation in court against the other banks and trust companies that are claiming the benefit of said stipulation.

Speaking of the doctrine of estoppel as applied to municipal corporatious, Herman, in his work on *Estoppel and Res Judicata* (*vol.* 2, *p.* 1365), states:

"The true principle in such cases is well settled. That one can not do indirectly, what can not be done directly, and where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel."

Any agreement by a municipality, although properly executed, whereby a portion of its tax-payers are given immunity from taxation (as this stipulation in effect does, if carried out), would violate the provisions of the present State Constitution and the Kentucky Statutes, pertaining to revenue and taxation. (*Appendix to this brief*, *secs.* 3, 170 *to* 175, *and* 181, *State Constitution*; *secs.* 2980, 4020, *Ky. Stats.*) The stipulation made by the former City Attorney, which provides for immunity from municipal taxes in favor of certain banks and trust companies, in a certain contingency, is absolutely null and void. We do not question his motives or good faith in entering into this alleged stipulation. We simply claim he acted without authority of law, of which complainants were bound to take notice.

Section 162, of the State Constitution, is as follows:

"No county, city, town, or other municapility shall ever be authorized or permitted to pay any claim created against it, under any agreement or contract made without *express* authority of law, and *all such unauthorized agreements or contracts shall be null and void.*"

There are some features of this agreement which should prevent the court from making it a precedent or upholding it as within the scope of the statutory authority of the City Attorney of the City of Louisville.

It has no date. Why, no explanation is given or even offered. Judge Barker fails to fix definitely or positively when it was prepared and signed, but thinks it was about December, 1894, which was six months after the prohibition suits had been brought and decided in the Jefferson Circuit Court. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 51.) It must have been several months later, however, because the fourth clause recites that "all said banks and companies, except those actually involved in the test cases, *paid* the whole of the amount of taxes claimed as against them by the City of Louisville, without reservation until the question thus raised should be finally disposed of" (*Ib.*, 15.) Exhibit No. 6, with Terry's deposition, shows all the payments for license taxes by said institutions were not made until April 15, 1895. (*Ib.*, 77.) Is it not probable, therefore, that this retrospective agreement was not reduced to writing and signed until after the decision of the Court of Appeals of June 1, 1895? There is nothing in it to show it was executed at an earlier date. Thus this important stipulation appears to have been carried in the memory of counsel until that decision, and then it was formulated for the first time.

The names of the banks, trust, and title companies that were to be the beneficiaries of this agreement are not given therein. Only the names of the three banks that brought suits are stated. The counsel signed their own names "for the banks, trust, and title companies of the City of Louisville," thus leaving the question open and uncertain as to what institutions were represented by them, and making it necessary to resort to oral proof to ascertain the number and names of the corporations of these three classes which were doing business in the city when said document was entered into. Thus, it was all the more important to fix the date of its execution, for the record shows several of such institutions went out of business between February 13, 1894, and April 15, 1895. Besides the resolution of the Commissioners of the Sinking Fund of the former date states there were "two or three exceptions" that were unwilling to go into the proposed arrangement concerning the payment of the license tax; and Judge Barker testifies, after his memory is refreshed, that one of these was the Fourth National Bank, which paid no license tax in 1894 or 1895, and was not in fact represented by the counsel who signed said agreement. (*Ib.*, 57.)

This agreement, which was to tie the city's hands in the matter of taxation during the corporate existence of these institutions (in some cases for twenty years), was not executed in duplicate. No copy was filed with any official of the City of Louisville, or the Commissioners of the Sinking Fund; nor was it filed or made a matter of record in either of the prohibition suits. The original, when this litigation was commenced, April 17, 1897, was held by some representative of the banks, and the present authorities of the city were in total ignorance of its existence or contents.

In this agreement it is assumed that the trust and title companies, having no privilege to do a banking business, were on the same footing with State banks, chartered after February 14, 1856; and the City Attorney undertook that such companies should be exempted from municipal taxation if the Louisville Banking Company was adjudged to be.

The court below refers to the fact that these institutions claiming to be privies to the litigation in the prohibition suits, paid considerable sums to the Commissioners of the Sinking Fund on the faith of the verbal agreement made with said Commissioners and the City Attorney. These payments of the license tax, imposed for the years 1894 and 1895, do not estop the city from collecting its *ad valorem* taxes on the franchises or intangible property of said institutions, which amounted to more than the sums paid. Besides, when Judge Barker was cross-examined on this subject, he stated the banks, that did not sue, in December, 1894, agreed to pay their license taxes absolutely, without reserve, and gratuitously, and neither the city nor the Commissioners of the Sinking Fund, made any concession or gave any promise or consideration therefor. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 52, *questions and answers*, 62–3–4.) Further on, he refers to the answer filed by him for the Commissioners of the Sinking Fund in the suit of one of the banks to recover back the license taxes paid, as the correct statement of the facts and circumstances under which the license taxes were paid by these complainant banks absolutely, and shows clearly they were paid for a totally different reason than that pretended in these actions. After stating the arrangement with said Commissioners as to the payment of license taxes under said resolution of February 13, 1894, he quotes from the said answer and makes it part of his testimony, taken by complainants, as follows (*Ib.*, 62):

"The defendants state that afterwards there was instituted and was pending in the Jefferson Circuit Court, Common Pleas Division, several actions by tax payers, styled, 'George W. Levi against the City of Louisville,' and 'J. Duff Reed against the City of Louisville,' wherein it was claimed that under and by virtue of the present Constitution of the State of Kentucky there was bound to be a uniform rate of *ad valorem* taxation upon all property, whether real or personal, for city, county, and State purposes; that said last named actions came on for trial before the Judge of the Common Pleas Division of the Circuit Court, who rendered an opinion and judgment therein, wherein it was adjudged that all property in the city of Louisville under the Constitution must be taxed at a uniform *ad valorem* rate of taxation, and that any attempt on the part of the City of Louisville to substitute a license system of taxation in lieu of the *ad valorem* system was void. After this judgment was rendered during the fiscal year of 1895, which said fiscal year began on the first day of September, 1894, the subject of what the city should do in regard to taxing the banks and trust companies of the City of Louisville again came up between the Board of Sinking Fund Commissioners and the counsel for the plaintiff and the other banks and trust companies. *The counsel for said banks and trust companies were extremely*

anxious that the City of Louisville and the Sinking Fund Commissioners should still continue the license system of taxation, and, above all things, feared and dreaded the ad valorem system of taxation as applied to the banks and trust companies, and the plaintiff and the other banks and trust companies of the City of Louisville entered into a *new* agreement and contract with the City of Louisville, by which it was then and there agreed that if the City of Louisville should continue the license system as to the banks and trust companies of the City of Louisville in lieu of the *ad valorem* system of taxation until the Levi and Reed cases against the city and the cases of the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank against R. H. Thompson, judge, and the City of Louisville, should be all finally determined and ended in the Court of Appeals, where they were all then pending, that the plaintiff and the other banks and trust companies, except the three litigating banks, would all surrender the notes that they had received for the loans made under the first agreement heretofore set out, and would, pending the termination of said actions in the Court of Appeals, pay year by year the license required by the ordinance in question, absolutely and without recourse."

Thus it will be observed that these institutions, claiming to be privies to the parties plaintiff in the prohibition suits, did not pay their license taxes on the promise of the city that they should be entitled to the benefit of the judgments in that litigation, but they were made, and said Commissioners' notes for prior payments were surrendered, upon a totally different consideration, viz.: that, after the decision of the Jefferson Circuit Court in the Levi case, the city was to "continue the license system as to the banks and trust companies of the City of Louisville in lieu of the *ad valorem* system of taxation (which was feared and dreaded) until the Levi case" and others were determined in the Court of Appeals. Who made such an agreement for the city is not stated, and while it was, of course, invalid, the fact is made plain by Judge Barker, these complainants' own witness, that these payments for license taxes of four per cent. on gross earnings in 1894 and 1895 were made voluntarily, absolutely, and gladly for the sole purpose of escaping the payment of *ad valorem* taxes for the same years; and not upon the faith of an agreement by the City of Louisville that these non-suing banks should have the benefit of the judgments that might be obtained by those that had sued, as the court below supposed in its opinion on the demurrers to the bill (88 *Federal Reporter*, 406–7). The complainants' proof does not [illegible]ain the allegations of their bills in this respect. Judge Barker [illegible]rob-orated on this point by the resolution adopted by the Louisville Clearing House Association December 17, 1894 (*Exhibit No.* 5, *with Leathers' deposition, Ib.*, 92), as follows:

"That it was expedient that all the banks except the Bank of Kentucky, Bank of Louisville, Third National Bank, and the Louisville Banking Company, should surrender the notes given them by the Sinking Fund in 1894, and that all the banks, except the Bank of Kentucky and the Bank of Louisville, should, for the year 1895, pay the four per cent. license tax without reservation, provided,

always that the General Council shall pass a levy ordinance that does not include in its terms tax on capital stock, surplus of banks and trust companies."

But, as conclusive evidence that the City of Louisville was not a party to any of these void agreements referred to by its City Attorney, the General Council did not follow them nor the Leathers resolution, but ignored the same in the levy ordinance approved by the Mayor December 22, 1894, for the fiscal year ending August 31, 1895, in which the *ad valorem* tax rate was levied "on lands, improvements, and on all personal property in the City of Louisville, as is held or owned by every person, firm, or corporation, subject to taxation for city purposes under the laws of Kentucky (this includes the revenue act of November 11, 1892), and under 'an act for the government of cities of the first class,' approved July 1, 1893, and in each case on each one hundred dollars in value." (*Appendix, Ordinance No.* 4). It will be seen by the terms of this ordinance the city was not a party to any alleged agreement to "continue the license system as applied to the banks in lieu of the *ad valorem* system of taxation," but proceeded by its General Council and Mayor to levy *ad valorem* taxes on all property, "subject to city taxation," under the general laws of the State, as well as the act for the government of the city, or upon all property, including franchises or intangible property, owned by every person or corporation, assessed by the Board of Valuation and Assessment or the City Assessor.

But as further showing that these institutions, claiming to be privies to said litigation, have not been prejudiced in any manner by paying their license taxes, and that equity does not require the enforcement of this arrangement with the former City Attorney, we call the court's attention to another ordinance read in evidence by the City of Louisville on the final hearing of these cases. In order to give these banks aud trust companies, as well as all others, the benefit of the amounts paid in lieu of *ad valorem* taxes in 1894 and 1895, an ordinance was passed August 6, 1895, after the decision in the Levi case (97 *Ky.*, 394), allowing all persons or corporations credit on their *ad valorem* tax bills on personalty by the amount of license taxes paid in the same year on their business or occupation in which such personalty was used or employed. (*Appendix, Ordinance No.* 5.)

Under the facts shown by the records, the City of Louisville is neither legally nor morally bound by such an agreement.

In *People and Taylor* v. *Mayor*, 11 *Abb. Prac.*, 66, the question involved was whether the corporation counsel of the City of New York had the power to enter into certain stipulations, which a private attorney could not have lawfully made without the consent of his client. The court held distinctly that no such authority existed and said:

"In neither the charter nor ordinances is this power given (*i. e.* to the corporation counsel) other than the charge and conducting of actions.

"They give him no right to assume the control of the property or interests of the city *beyond that which belongs to any attorney or counsel in the ordinary management of suits.*

"The permanency of the office makes no addition to his powers as attorney or counsel. * * *

"If the head of the law department can, by his act, make the corporation a party to suits, and when a large recovery is had against the city, can stipulate that the city shall not have any means of review or redress, *he would possess an absolute control over the city property far beyond that possessed even by the Common Council.* It appears to me that he possesses no such power."

An attorney can not, under his general authority, accept service for his client of the original process by which the action is begun; for by such service the jurisdiction of the court over his client is established, and until that be done, the relation of attorney and client can not begin. (1 *Wait's A. & D.*, 439; *Bayley* v. *Buckland*, 1 *Exch.* (*W. H. & G.*); *Masterson* v. *LeClaire*, 4 *Minn.*, 108; *Starr* v. *Hall*, 87 *N. Car.*, 381; *Reed* v. *Reed*, 19 *S. Car.*, 548.)

So in these cases, under the statute, the relation of attorney and client between the City Attorney and the City of Louisville can not begin unless suit is brought. On this principle, the authority of an attorney to submit his client's cause of action to arbitration is limited to cases where there is a suit pending, which he has been employed to manage. (*Nagle* v. *Ingersoll*, 7 *Pa. St.*, 185.)

In *Starr* v. *Hall*, *supra*, 383, the court states:

"The principle upon which these authorities rest is, that it is no part of the duty of an attorney, nor within the scope of his authority to admit of service for his client of the original process by which the jurisdiction of the court over the person of the client is first established, for until that be done the relation of client and attorney can not begin; nor can it be created by the act of the attorney alone. To exercise such a power would be to act rather as an agent or attorney in fact, than as an attorney of the court, and to give effect to it there must needs be a special authority for it; and as the law is plain that the summons must be personally served upon the defendant, if a party will take upon himself the responsibility of discarding the mode prescribed by law, and admit of a waiver of such service by an attorney, he is bound to see to it that the latter has the authority to act, or else the inconvenience must be on himself."

If an attorney has no power under his general authority to accept service of original process or to enter the appearance of his client to an action commenced by his adversary, he certainly has none to do that which is more material and important, viz.: to stipulate that the judgment in a pending suit, to which his client is not a party to the record, shall settle and determine the rights of his client with respect to causes of action not sued on at all, or to enter the appearance of his client or make his client a party to an appeal from the judgment in such suit.

The wisdom of the rule which confines the authority of an attorney to the management of *cases in court* must be apparent in view of what was attempted to be done by the former City Attorney by signing this retroactive agreement. If various suits are brought, involving the same issues, and the interest of his client is of the same character in all, by virtue of his retainer, an attorney has authority to

stipulate that the trial of one case shall determine the like issues in all the others. Thus, the same judgment may be entered in all the cases in court, and the matter becomes adjudicated. Counsel for these institutions ask: Was it proper to subject the city to the cost of twenty-five suits when every phase of the question could be determined in three? We answer that this court is not dealing with a question of propriety, but one of legal authority. Again, the same counsel ask: Was it right for the City Attorney to insist upon all of the cases being brought, when the result would be that the city would collect no taxes at all from the banks for a year or two? We answer, the City Attorney's statutory authority extended only to the defense of suits; and it was a question for the counsel of these institutions to decide for themselves, whether they would bring a suit for each of their clients. If said counsel have made the mistake of not instituting a suit for each institution, and obtaining an agreement with the City Attorney, after they all became pending cases in court, that the trial and judgment in one of them should determine all others on the same footing, and involving the same issues, and in not having such judgments entered accordingly, the legal consequences of such mistake must be borne by their clients. The City of Louisville can not be deprived of its lawful rights in the collection of its public revenues, by either the mistake of counsel representing those who should pay the same, or the unauthorized acts of its own officials. Had suits been brought for all of these institutions, the cost and labor of preparing and trying all but a few of them might have been avoided by a stipulation between counsel for the plaintiffs and the attorney for the defendant that the judgment in one or more should determine the same issues in others, which would have been within the scope of their general authority in the management of the cases pending in court, and then there would have been an adjudication in fact and according to law upon the subject-matter involved in each case. No precedent was cited in the opinion by the court below, and none has been cited in the brief of counsel for these institutions, upholding an agreement like the one under consideration as coming within the general authority of an attorney. We venture the assertion that opposing counsel can not produce a decision of this court, or of the highest court of any State, which sustains a stipulation like the one presented in these cases, as being within the general authority of an attorney. In all the cases cited, or that can be cited on this point, it will be found the stipulation in question by the attorney under his general authority was upheld or enforced with respect to pending cases in court only.

We, therefore, insist that the banks and trust companies claiming as privies to the plaintiff banks in the prohibition suits have no available plea of *res judicata*, and their bills should have been dismissed.

V.

THE NATIONAL BANKS.

1. Of the banks organized and doing business on May 17, 1886, which seek an injunction from this court, one, the appellant, First National Bank, failed or refused to accept the proposition of the State, and filed no agreement with the Governor within the specified period. This is conceded by said bank's counsel, and there is no allegation in the bill of said complainant that it complied with the provisions of the Hewitt Act. It is alleged, however, in the two bills of said bank that while it was not bound by the National Banking acts to submit to taxation under the Hewitt Act, it nevertheless had paid its State taxes in accordance therewith, which taxes the State, through its proper officers, received and appropriated, and that, in this manner, it accepted the provisions of the Hewitt Act. Whether the taxes paid by this bank to the State from 1887 to 1892, inclusive, were paid under section 1, or section 7 of article 2 of the Hewitt Act is not disclosed by either of its bills. (*See Hewitt Act in Appendix to this brief.*) But, assuming that the rate of taxes paid was that fixed in section 1, the mere acceptance of the same by the State cannot constitute an irrevocable contract between said bank and the State, or the City of Louisville. Under section 7 said bank has been liable to municipal taxation since the passage of the Hewitt Act. It certainly has no cause of complaint against the revenue law of November 11, 1892, when it has been gratuitously allowed to escape the payment of taxes to the City of Louisville for so many years. The rights of the State and city are not lost by delay merely, nor can they be waived by its executive officers. (*State* v. *Minn. Cent. R. R. Co.*, 36 *Minn.*, 246.)

As to the First National Bank, there was no discrimination against it in the Hewitt Act. It was afforded the same opportunity as was extended to other banks to accept the scheme of taxation therein provided for, and it failed to embrace it, and thereby became liable, under section 7, to pay the same rate of taxes, State and municipal, as individuals. But it seems plain that this bank has no cause of complaint against the general revenue law of November 11, 1892, which places all banks, State and National, old and new, on precisely the same footing, with respect to taxation, State, county, and municipal. A number of new State banks, as well as new National banks, were organized between December 30, 1887 (the date the period in which the Hewitt Act had to be accepted, expired), and the adoption of the present Constitution of the State, September 28, 1891. Other new State and National banks have been organized in the State since the latter date.

It is insisted, however, by counsel for this National bank, that the State can not discriminate between it and the banks in existence prior to December 30, 1887, and which accepted the terms of the Hewitt Act. In other words, that the State Legislature is, and has been since the passage of the Hewitt Act, powerless to place new National banks or those that did not accept the Hewitt Act on the same footing as to taxation with the new State banks, which do not

and can not question their liability for State, county, and municipal taxes under the general revenue law of November 11, 1892.

But the Court of Appeals of Kentucky has expressly decided that all banks, State and National, chartered or organized since the enactment of the Hewitt Act, have no contract with the State, much less an irrevocable one. (*Bath County* v. *Farmers' Bank*, 39 *S. W. Rep.*, 1115; *Citizens' Bank of Shelbyville* v. *City of Shelbyville, and other bank tax cases*, *Ib.*, 1116.)

In *Lionberger* v. *Rouse*, 9 *Wall.*, 468, (decided in 1870), the facts were substantially as follows:

Lionberger, the plaintiff in error, in 1867 owned two hundred shares of stock in the Third National Bank of St. Louis, which were taxed $1.70 on the $100 for State, county, and school purposes, under a statute of the State of Missouri enacted in 1865, which required said taxes to be paid by the corporation for its stockholders. There were two State banks incorporated under a law enacted in 1857, which had the privilege of paying to the State one per cent. on the amount of its capital stock in full of all other taxes. Lionberger brought suit against the tax collector and resisted the collection of the taxes assessed against the said National bank on the ground that his shares therein could not be taxed higher than the capital stock in the said two State banks, and that said statute of 1865 violated section 41 of the National banking act of June 3, 1864, which prohibited a State (1) from taxing shares in a National bank higher than it taxed other moneyed capital in the hands of its own citizens, and (2) from imposing on them a tax exceeding the rate imposed upon the shares in any of the banks organized under State authority. It was conceded the taxes exacted on the shares of stock in said National bank were not greater than were assessed on other moneyed capital belonging to individuals or other corporations, but Lionberger's sole claim was that they were higher than the rate paid by the said two State banks The court, in sustaining the Supreme Court of Missouri, which upheld the validity of the taxes assessed under the said law of 1865, said:

"It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the National banks. The measure itself had reference to prospective legislation by the States and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act which it had obliged itself not to do. It was known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised."

Again, the court states:

"Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the

proviso to the forty-first section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of *issue* of its own creation."

It will be observed that the court construed the second limitation in section 41 of the act of June 3, 1864, as having reference to the tax assessed by a State upon banks of *issue* of its own creation.

The State banks in Kentucky are not banks of issue. Those that brought suits in the court below are not alleged to be banks of issue. Besides, since the act of February 10, 1868 (15 *Stat. at L., p.* 34), there has been no express statutory restriction on the power of a State to tax the shares of National banking associations at a rate not exceeding that imposed upon the shares in any of the banks organized under State authority. The power of a State to tax the shares of National banking associations located within the State, under the present statute, is subject only to two restrictions, viz.: (1) "The taxation shall not be at a greater rate than is assessed upon other *moneyed capital* in the hands of *individual* citizens of such State; and (2) the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere." (*Sec.* 5219, *Rev. Stats. U. S., edition* 1878, *p.* 1009).

In none of these bills of the National banks is there an allegation that the State, by the law of November 11, 1892, taxes the shares of National banking associations "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." To show a conflict between the State and Federal statutes, it is alleged in the several bills of the National banks that the State revenue law of November 11, 1892, does not provide for taxing the shares of National banks, but attempts to subject to taxation their franchises granted by the Congress of the United States, and its other intangible property, such as their surplus, undivided profits, and investments.

The Supreme Court has repeatedly held that the tax on the shares in National banks may be collected from such corporations instead of from the shareholders. (*First National Bank of Louisville* v. *Com. of Kentucky*, 9 *Wall.*, 353; *Lionberger* v. *Rouse*, *Ib.*, 468.) In the case of non-resident shareholders, the only mode in which the State could reach their shares for taxation is to collect the taxes from the bank.

It has also been held that the State is not confined to the *par* value of shares in such institutions; but may tax them upon their *market* value. (*Hepburn* v. *School Directors*, 23 *Wall.*, 480; *People* v. *Commissioners of Taxes*, 94 *U. S.*, 415).

The revenue law of November 11, 1892, for the assessment by the Board of Valuation and Assessment of what is termed the "franchise," of certain corporations has been recently passed on by the Supreme Court of the United States and held to be not in violation of either the State or Federal constitutions. (*Adams Express Co.* v. *Kentucky*, 166 *U. S.*, 171; *Henderson Bridge Co.* v. *Commonwealth of Kentucky*, *Ib.*, 150). In the former case the court states:

"Taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080, and 4081, we agree with the Circuit Court, that it is evident that the word 'franchise' was not employed in a technical sense. * * * * As pointed out by the Circuit Court, the mode of assessment of the intangible property of companies, corporations, and associations mentioned in section 4077, and that of individual tax-payers, is different, and the intangible property of such corporations, companies, and associations, may, in some respects, differ from the intangible property belonging to individual tax-payers; but there is nothing in the statute which exempts any intangible property owned by any corporation, company, or individual tax-payer from taxation, or *discriminates* between them." (*See Act of November* 11, 1892, *Appendix to this brief.*)

The "franchise" of a National bank, which is granted by Congress, according to this decision, is not taxed by the State revenue law as alleged in the bills of the National banks. It is furthermore decided that there is nothing in the State revenue law which *discriminates* between corporations, companies, and individuals.

As was said in *Mercantile National Bank* v. *New York*, 121 *U. S.*, 138–62:

"The main purpose of Congress in fixing limits to State taxation on investments in shares of National banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of like character. * * * The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of National banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens."

It appeared in that case that the capital stock of the trust companies under the laws of New York was required to be assessed at its actual value, to be ascertained, among other standards, by reference to the market price of its shares, so that the aggregate value of the entire capital might be the market price of one multiplied by the whole number of shares. It was stipulated also in that case that the deposits in savings banks amounted to over $505,000,000, all of which were exempted from taxation.

Of these deposits the court said:

"It can not be denied that these deposits constitute 'moneyed capital in the hands of individuals' within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in National banks must thereby also be exempted from taxation."

The method of assessment provided by the revenue law of Kentucky with respect to National banks produces no inequality or unjust discrimination. The aggregate of the assessed value of the capital stock of a National bank constitutes no more nor less than the market or actual value of all the shares of stock owned by the stock-

holders in such bank. This value may be taxed under the provisions of the Federal statute at a rate not greater than is assessed upon other moneyed capital in the hands of individual citizens. The bank is required to pay taxes on no more than all the shares of stock in it are worth, and the taxes paid by it are paid for its stockholders. The character of the information in the report required by the statute of November 11, 1892, shows the value to be ascertained therefrom, is that of all the shares of stock in the corporation, less the tangible property of the corporation otherwise assessed, which is to be deducted, but the value of the "franchise," so-called, and the value of the tangible property taken together, constitute the assessed value of all of the shares of stock in the corporation.

The courts, in construing section 5219 of the U. S. Revised Statutes, hold that it simply prohibits taxation at a greater rate than like property similary situated. (*Mercantile National Bank* v. *New York*, 121 *U. S.*, 138; *Davenport National Bank* v. *Davenport Board of Equalization*, 123 *U. S.*, 83; *National Bank of Redemption* v. *Boston*, 125 *U. S.*, 60; *Palmer* v. *McMahon*, 133 *U. S.*, 660; *Talbott* v. *Silver Bow County Commissioners*, 139 *U. S.*, 438.)

In the case of *Davenport National Bank* v. *Board of Equalization*, *supra*, it was claimed that the National banks located in the State of Iowa were taxed at a rate in excess of the taxes levied on other moneyed capital of the State. The State law taxed savings banks on the amount of their paid-up capital, and did not tax the shares of the banks held by the individual shareholders. It was urged that in no other mode than by taxing the stockholders of each and all the banks could a perfect equality of taxation be obtained. The court, through Justice Miller, said:

"The argument is not conclusive, if the proposition were sound; for the act of Congress does not require a perfect equalization of taxation between State and National banks but only that the shares of the National banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that, if the capital of the National banks were taxed at a much lower rate than other moneyed capital in the State, the banks would have no right to complain, and the law in that respect would not violate the provisions of the act of Congress for the protection of National banks.

"It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the National banks upon the shares of their stock in the hands of their owners. All that has been held to be necessary is that the system of State taxation of its own citizens, of its own banks, and of its own corporations, shall not work a *discrimination unfavorable* to the holders of the shares of the National banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits the manner

of *assessing* and *collecting* all taxes by the States is uncontrolled by the act of Congress.

"In the case before us the same rate per cent. is assessed upon the capital of the savings banks as upon the shares of the National banks. It does not satisfactorily appear from anything found in this record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the National banks. It is not a necessary nor a probable inference from any thing in this system of taxation that it should be so. If, then, neither the necessary, usual, or probable effect of the system of assessment *discriminates in favor* of the savings banks against the National banks upon the face of the statute, nor any evidence is given of the intention of the legislature to make such a *discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional.*"

There is no allegation here in any of the bills of the National banks that the State statute of November 11, 1892, works an actual or material discrimination in the matter of taxation against such banks. Therefore, "it is not a case for this court to hold the statute unconstitutional," or in violation of the Federal laws. There being no injury alleged or shown on the face of the State statute, no relief is needed, nor will this court interfere, by injunction, and require the State to abandon its "system of taxation of its own citizens, of its own banks, and of its own corporations." This court will certainly not hold that it owes these National banks any duty to entertain jurisdiction of their actions and grant their applications for injunctions unless they have alleged and proven to its satisfaction that the State law complained of "works an *actual* and *material discrimination unfavorable to the holders of the shares in such National banks.*"

In *First National Bank of Aberdeen* v. *Chehalis County*, 166 *U. S.*, 440, the statute of the State of Washington concerning taxation of banks was involved. The statute there construed was very similar to the statute in this State (*Ib.*, 443). The bank was required to furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserved fund, and the amount of undivided profits of such bank or banking association. The statute further provided: "The aggregate amount of capital, surplus, and undivided profits shall be assessed and taxed as other like property in the State is assessed and taxed: *Provided*, at the time of listing the capital stock the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus, and undivided profits, and the remainder then taxed as above provided."

It is true the court in that case said:

"If this section stood alone there might be ground for the contention that it contemplates taxation of the capital of the bank. But section 23 of the statute provided that 'each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners, or owner under the pro-

visions of this act, and may pay the same out of their individual profit account, or charge the same to their expense account, or to the accounts of such shareholders, owners, or owner in proportion to their ownership.'"

The Supreme Court of Washington had held in said case that these two sections were to be read together, and that, so read, their provisions were not inconsistent with those of the Federal Statute. The Supreme Court of the United States concurred in this opinion, and upheld said statute as contemplating taxation on the shares of capital stock after the value of real estate had been deducted therefrom.

So the Kentucky Statute (*sec.* 4078) provides for the statement, under oath, from each bank of the amount of capital stock, preferred and common, the number of shares of each, the amount of stock paid up, the par and real value thereof, the highest price at which such stock was sold at a *bona fide* sale within twelve months, the amount of surplus fund and undivided profits, etc.

Section 4088, of the same statute, provides:

"The individual stockholders of the corporation, which are by this article required to report and pay taxes upon the corporate franchise, shall not be required to list their *shares* in such companies, *so long as the corporation pays the taxes* on the corporate property and franchises as herein provided."

We insist that this section, taken in connection with the other cited, shows clearly that the corporation is treated merely as the agent of the stockholders in paying the taxes on the value of all the *shares* of stock after the value of the tangible property constituting a part thereof has been deducted. This section, in other words, is equivalent to the qualifying section found in the statute of the State of Washington, construed in the case of *Aberdeen Bank* v. *Chehalis County, supra.* In other words, if the bank pays the taxes on the value of the shares of stock, then the shareholders shall not be required to list the value of their shares and pay taxes thereon; but if the bank fails or refuses to pay taxes on the same, then the shareholders will be required to list their shares and pay taxes on the value thereof. Thus double taxation is avoided in either case.

In passing on the contentions of counsel for the National banks, the court below in *First National Bank* v. *Stone, et al.*, 88 *Fed. Rep.* 411–12, said:

"It is contended, however, that the definition given to the term 'capital stock,' used in the revenue act of 1892, includes more than the sum of the value of the shares of the capital stock of a corporation. It is true that in the case referred to (*Henderson Bridge Co.* v. *Com.*, 31 *S. W.*, 486) the Court of Appeals of Kentucky held that it was proper for the Board of Valuation and Assessment to fix a valuation of the capital stock of the Henderson Bridge Company at more than the market value of the sum of the shares of the capital stock. In that company the shares of capital stock aggregated $1,000,000, the market value of which was 90 cents on the dollar. It had a mortgage upon its property to secure a bonded indebtedness of $2,000,000. In reaching the amount of the capital stock of the bridge company, the board added the market value of the shares

of the capital stock to the market value of the mortgage bonds, taking it for granted that that would show the real amount of property, tangible and intangible, owned by the company. This mode of assessing the capital stock was held to be proper under the law. In such a case, of course, the assessment for taxation would be more than the value of the shares of the capital stock. There could be no such result, however, in the application of the law to National banks, because they are not permitted to issue bonds, and do not hold property under mortgage. It is not averred in the bill, and it does not appear, that the assessment of valuation for taxation against these complainant banks *exceeds the market value of their shares of capital stock*. However the law may operate, therefore, upon that class of corporations which have bonded indebtedness, it certainly does not in the case of the National banks tax anything more *than the equivalent in value of the shares of the capital stock*. If it does so, there ought to be some averment to show this. *Supervisors* v. *Stanley*, 105 *U. S.*, 311. The bill contains no such statement.

"Another objection to the operation of the revenue act upon the complainants is that certain of the State banks and National banks are now, by reason of the *previous litigation*, enabled to escape all taxation except that provided under the Hewitt Act, and that this is a discrimination against them, in violation of section 5219, above quoted. * * *

"In the former litigation certain banks have been declared to be free from taxation by reason of a contract of exemption. By subsequent decisions in the same court, if that be a material question in that court, the former ruling was declared erroneous. But, by the doctrine of *res judicata*, the particular banks engaged in the prior litigation are able to rely upon it as a bar to the enforcement of the law of 1892. That law, by its terms, applied to all banks equally. In so far as the State has had the power to do so, therefore, it has made the taxation of all banks equal. We do not think that the exceptions to the operation of the law, produced by the accident of litigation, can make the discrimination arising between the parties to the litigation and those who were not parties,—a discrimination within the inhibition of section 5219 of the National banking act. The motions for preliminary injunction will be denied, the demurrers to the bill will be sustained, and the bills dismissed."

The First National Bank pleaded that it was a privy, by agreement, to the Third National Bank in the latter's prohibition suit, and entitled to the former adjudication in that suit, but the court below was of the opinion that the status of these two banks was not the same, because the Third National Bank had accepted the Hewitt Act; whereas, the First National Bank had not; and the agreement relied on showed on its face that it embraced only the institutions which had accepted said act. The bills of the First National Bank were, therefore, in any event, properly dismissed.

2 But the Third National Bank and Citizens National Bank by their appeals (Nos. 404 and 405), present another question for review by this court, viz.: whether the corporate existence, contemplated by the provisions of the Hewitt Act, as the period during which they

should be exempt from municipal taxation, was that which said two National banks had when said act was accepted, which expired in August, 1894, or, in addition, that which was obtained by an extension or renewal of their original corporate existence, by compliance with certain requisites of the National banking laws, for a second period of twenty years. The court below held that the corporate existence (during which immunity from municipal taxation should continue), intended by the Hewitt Act was that which National banks had at the date they accepted said act, and if they chose thereafter to take the steps necessary to obtain a renewal or extension of their corporate existence for another period of twenty years, they occupied, during such extended period, the same or a similar attitude as that of a State bank whose charter had been amended so as to extend the corporate existence of such bank.

The language of section 1, of the Act of Congress of July 12, 1882 (1 *Sup. R. S.*, 353), confirms this view. There it is provided that any National banking association "may at any time within two years next previous to the date of the *expiration of its corporate existence* under the present law, and (1) with the approval of the Comptroller of the Currency, to be granted as hereinafter provided, *extend* its period of succession, by (2) *amending its articles of association*, for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period."

Here it will be seen that unless the original articles of association are (1) amended, and (2) such action meets the approval of the Comptroller, the corporate existence of the association will expire.

The only difference between such an extension and that of a State bank consists in the means provided by law for obtaining it. By section two of said act of Congress (1 *Sup R. S. U. S.*, 353), it is provided that such amendment to the articles of association "shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association." Section three provides for a special examination of the condition of the association, and, if it is satisfactory, the Comptroller shall grant his certificate of approval, and, if not satisfactory, he shall withhold such certificate. Section six requires the redemption of all the circulating notes of any association within a certain period after "the date of the extension of the corporate existence" of the association, and provides for issuing others bearing a new device to be approved by the Secretary of the Treasury, so they can be "readily distinguished from the circulating notes" theretofore issued.

The cases cited by counsel for the National banks only decide that such banks, by taking the legal steps to extend their corporate existence under said act of July 12, 1882, do not lose their identity. Liabilities due to the bank before belong to the bank after the extension, and may be collected by suit; and liabilities of the bank existing before the extension remain so afterward, and the bank may be sued thereon. (*First Presbyterian Church* v. *National State Bank*, 57 *N. J. Law*, 27; *National Exchange Bank* v. *Gay*, 57 *Conn.*, 224; *City National Bank* v. *Phelps*, 97 *N. Y.*, 44; *People* v. *Backus*, 117 *N. Y.*,

196). The same rule would undoubtedly apply to a State bank, whose charter life had been extended by legislative enactment. So, where a State bank has been transformed into a National bank, the latter may be sued and required to pay the debts of the former. (*Metropolitan National Bank* v. *Clagget*, 141 *U. S.*, 520); and likewise after such transformation, liabilities incurred to the bank while a State bank may be sued on and a recovery had in the name of the corporation which it had as a State bank, though properly such suit should be brought in the name of the corporation which it has assumed as a National bank. (*Michigan Insurance Bank* v. *Eldred*, 143 *U. S.*, 293).

The court below held in the *Northern Bank* case (88 *Fed. Rep.*, 421), that the act of the legislature of 1884 extending the charter life of said bank was a grant to a corporation, or an act of incorporation—a new charter. The court in that connection remarked, "it is our duty to give effect to this act (meaning the reservation act of 1856) so as to avoid the evil aimed at by the legislature, and no refined reasoning as to the question whether the extension is the lengthening of an old life, or the granting of a new one, ought to blind us to the palpable intention of the legislature to prevent, except by express words, the future granting of irrevocable powers, privileges, or exceptions."

It would be unjust and inconsistent to hold that the Northern Bank, or either of the State banks, which have obtained extensions of their original corporate existence, or have obtained their charters since 1887, are subject to pay municipal taxes under the act of November 11, 1892, and at the same time hold that National banks, which have obtained an extension of their original corporate existence under the provisions of said act of Congress since 1887, are not subject to such taxes. We insist that all State and National banks in Kentucky, which have obtained either extensions of their original corporate existence or new charters since 1887, (or the expiration of the period in which all of the banks of the State then in existence were afforded the privilege of accepting the provisions of the Hewitt Act), are now bound to pay municipal taxes under the provisions of the act of November 11, 1892, from the date of their several extensions, or of their new charters. This establishes uniformity and equality between State and National banks.

Section 4. of the Hewitt Act, provided that the banks accepting the provisions of said act in the manner and within the period prescribed "shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." What corporate existence is there meant by the legislature? Certainly the corporate existence which the accepting banks then enjoyed. If, after the expiration of the period prescribed by the Hewitt Act, a State bank has obtained an extension of its corporate existence by an act of the legislature, or a National bank has obtained the extension of its corporate existence by compliance with the act of Congress of July 12, 1882, there is no immunity from municipal taxation under the provisions of the Hewitt Act *after such extension.* All State and National banks, outside of the City of Louisville, except

the Bank of Kentucky, Farmers Bank of Kentucky, and Deposit Bank of Frankfort, are now required to pay county and municipal taxes, under the repeated decisions of the Court of Appeals and the opinions of the lower court in these cases.

The judgment in the prohibition suit of the Third National Bank, which was instituted on June 18, 1894, prior to the extension of its corporate existence, can in no event operate as *res judicata* against the City of Louisville, except for the years 1893 and 1894. Under the opinion of the court therein that bank had a good cause of action against the City of Louisville to enjoin the collection of its taxes against said bank for said two years, but the suit of said bank against S. H. Stone, *et al.* (No. 404) was properly dismissed, because it sought to enjoin the assessment of said bank for municipal taxes for years subsequent to 1894.

As to the Citizens National Bank, it stands exactly on the same footing with the Third National Bank in this respect. The lower court held its suit against the City of Louisville presented a good cause of action for the years 1894 and 1895, but said bank's suit against S. H. Stone, *et al.* (No. 405) sought to enjoin the assessment of said bank for municipal taxes for years subsequent to 1894, and, therefore, it was also properly dismissed.

VI.

THE TRUST COMPANIES.

In the bills of the appellees, Fidelity Trust & Safety Vault Company and Louisville Trust Company, it is alleged that by the charters of said companies, respectively, they are empowered to do such banking business as is usually granted such corporations, and that since their organization they have engaged in the banking business in the City of Louisville. These allegations are denied by the answer.

The following is the concluding clause of section 8 of the original charter of the Fidelity Trust & Safety Vault Company, approved April 22, 1882 (*Session Acts* 1881, *vol.* 2, 900–905):

"But nothing herein shall be construed to permit said company to discount paper or to engage in the business of banking."

The following clause is part of section 9 of the original charter of the Louisville Trust Company, approved April 22, 1884 (*Session Acts* 1883–4, *vol.* 2, 276–87):

"But nothing herein shall be construed to permit such company to discount paper or engage in the business of banking."

After the expiration of the period in which the Hewitt Act had to be accepted, by amendments approved April 12, 1888, and May 15, 1890, spectively, to the charter of the former company, promissory notes payable and negotiable to any person or corporation at the office of said company, which shall be endorsed to and discounted by any bank incorporated under any law of the Commonwealth of Kentucky, or organized therein under any law of the United States, and all

promissory notes secured by lien on real estate or collateral, made negotiable and payable at the office of said company, shall be placed on the same footing as foreign bills of exchange. (*Session Acts* 1887–8, *vol.* 2, 1194; *Session Acts* 1889–90, *vol.* 3, 778–9.)

By an amendment to the charter of the latter company, approved May 15, 1886, said company was empowered to buy and sell notes secured by lien on real estate, also to loan money and take such notes in pledge as security for such loans, and all such notes bought by or pledged to said company as would be placed on the same footing as foreign bills of exchange, if discounted by any of the banks of the State of Kentucky, shall be placed on the same footing as foreign bills of exchange, provided said notes are given in fulfillment of contracts that have been fully executed at the time of such purchase or pledge. In the same amendment said company is given power to establish a savings department in connection with its business, and carry on business in such department as a savings bank.

No amendment, however, has been enacted to the charter of either of said companies permitting it to engage in the business of regular or general banking. The power to qualify and act in various trust or fiduciary capacities constituted the chief object in the organization of these companies. It is claimed by their counsel that they are both within the description of the corporations named in the Hewitt Act, and that having accepted and complied with its provisions like the banks, they are entitled to the same alleged immunity from municipal taxation. In other words, these trust companies insist because they are "institutions of loan," in the meaning of section 1 of the Hewitt Act, that they were and are exempt from municipal taxation and on the same footing as the regular banks. Section 5 of the amended charter of the Louisville Trust Company, last referred to, is as follows:

"For purposes of taxation, this company shall be classed and treated as one of the banks of this State, and shall be subject to and pay the same rate of taxes, to same parties, at the same time, in same manner, and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this State."

This section clearly refers to the "law from time to time" that may be adopted for the taxation of banks generally without reference to banks then having peculiar privileges, or the right to any particular rate or method of assessment and collection. Thus, this company, by a provision of its own charter, is brought within the general revenue law of November 11, 1892.

There is no provision in the charter of the Fidelity Trust and Safety Vault Company, or the amendments thereto, on the subject of taxation.

In the case of *Louisville Trust Company* v. *City of Louisville*, 30 *S. W. Rep.*, 991, decided May 3, 1895, (about thirty days before the bank tax decision of June 1, 1895.), it was distinctly announced by the Court of Appeals, there being no dissent by any member of the court thereto, that said trust company was not entitled to any exemption from taxation by reason of any *public service* to either the State or the city. That was a case where the City of Louisville

recovered judgment for the *ad valorem* taxes assessed against said company for the year 1892, upon its real estate, whereon was erected a seven-story office building, in the first story and basement of which the business of said company was carried on. The assessment was made as of September 1, 1891, prior to the adoption of the present State Constitution on September 28, 1891. The case was therefore decided with reference to the State Constitution of 1850 and the statutes thereunder. The contention of said company was that its said real estate was not taxable for municipal purposes under the provisions of the Hewitt Act, except to the limited extent the same was used for carrying on its business. The lower court held that all of said real estate was subject to the said taxes sued for, and the judgment therefor in favor of the city was affirmed by the Court of Appeals. The opinion in that case, delivered by Judge Grace, is especially interesting and noteworthy in view of the fact that he concurred in the majority opinion delivered by Judge Pryor in the bank tax cases a few weeks afterward. We make the following pertinent extract from this very able opinion bearing on the question of said company's liability for municipal taxes to the same extent as other tax-payers (*Ib.*, 993–94):

"Appellant enjoys all the advantages of being situated in the chief commercial metropolis of the State, and this location is the chief reason of its success and prosperity; and, being so located, it enjoys all the advantages, and receives all the protection, that is possible to be conferred by the municipal government. It enjoys every advantage that is enjoyed by other citizen tax-payers within the city limits. *It certainly is not entitled to any exemption from taxation by reason of any public service to either the State or the city, which is the only service that could excuse it from taxation under the old Constitution.* We are unable to see why, in this modified form, at least, it should not be required to contribute its proportion to the public burdens. We are speaking of this case as it arose under the old Constitution of the State, and under the revenue law of the State passed prior to the adoption of the present Constitution, and without any reference to what may be the liability of appellant to taxation, State, county, and municipal, under the new Constitution, and under the new revenue law, nor under the new charter of the City of Louisville. And this decision should be so understood. *We are not impressed with the equity of the act of the legislature in declaring that this corporation should be classed as one of the banks of the State, for the purposes of taxation. It is not a bank*, and it was, by the express provisions of its charter, declared that nothing contained in it should authorize it to do a banking business, *and this restriction has never been removed.* Whatever may have been the considerations of public policy that induced the legislature ever, in Kentucky, to adopt a different rate of taxation for banks to that applied to private individuals and to other corporations (which has always been of questionable propriety), *they did not apply to appellant, in any just and fair sense. But as the City of Louisville is not complaining of any restriction of this right of taxation, but is only attempting to tax as authorized under the Hewitt law, there is no question*

raised by the city claiming any other right. Of course, the issues made in this case do not affect the State."

It is clear that had the City of Louisville's claim for municipal taxes in that case been against all of the property of said company, real and personal, the Court of Appeals would have held said company was not entitled to any exemption whatever under the Hewitt Act, or otherwise. Certainly no exemption from municipal taxes can be maintained in its behalf now, since the taking effect of the present State Constitution, and the enactment of the general revenue law of November 11, 1892, and the "act for the government of cities of the first class" of July 1, 1893.

Nor does the complainant, Fidelity Trust & Safety Vault Company, stand in any better attitude with respect to municipal taxation. As to both of these trust companies, *they are purely business corporations* which render *no public service to the State or city* (as stated in said opinion of Judge Grace), and the attempted exemption from municipal taxation in favor of such companies, which were and are, aside from their trust business, mere "institutions of loan," was in violation of the State Constitution of 1850, and therefore void. (*Bill of Rights, art. xiii, sec.* 1)

The Court of Appeals of Kentucky has repeatedly decided, under the State Constitution of 1850 (which remained in force until September 28, 1891), that there can be no exemption from taxation, either State, county, or municipal, except in consideration of public services.

In *Louisville Water Co.* v. *Hamilton*, 81 *Ky.*, 517, it was held that although the Water Company rendered public service to the City of Louisville, its property was not exempt from State or county taxes by reason of such public service.

In *Barbour* v. *Louisville Board of Trade*, 82 *Ky.*, 645, it was held that an act of the legislature which provided that "any real estate held by the Louisville Board of Trade in the City of Louisville shall be exempt from taxation," was unconstitutional, being in violation of the first section of the 13th article of the State Constitution (of 1850), which provided that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services." It was further held in said case that in disseminating information in the City of Louisville, or even through the State of Kentucky, said Board of Trade did not render any such public service to the Commonwealth as was contemplated by said State Constitution. The court, in commenting on this clause of the State Constitution (*Ib.*, 651), said: "There can be no doubt that this provision is a restriction upon the exercise of the taxing power. It is certainly a 'public privilege' to be exempt from taxation. The exercise of such power is purely an act of sovereignty. Independently of any constitutional provision, the surrender of such an element of sovereignty is never to be presumed. Every intendment is against it so strongly that a reasonable doubt of the legislative intention to surrender or limit must be solved against such intention. Uniformity and equality of taxation is of the essence of the power, and an exception in one case is the increase of the burden

of taxation upon others not thus favored. * * * * The Constitution provides that the grant of an exclusive or separate privilege must be supported by the 'consideration of public service.' That consideration must be either past, present, or future. There is no pretense of a past or present consideration. If it is future, it must be prescribed in the act of incorporation. We find no duties prescribed there that could support a contract. The powers granted are mere gratuities, to be exercised at the pleasure of the company, and if they were imperative they are not public in their nature. * * * * As a general rule, the test of the right to exempt property is the existence of the right to levy a tax to foster such property. The levy of a direct tax upon the whole people of the State, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation had been conferred upon a designated individual, it would strike any one as palpably beyond legislative authority. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one, there is nnquestionably the power to exempt the other. It is not every enterprise that is incidentally beneficial to the public that will authorize the State to foster it at the expense of the people at large. The object must appear upon the face of the legislation to be directly for the public good, and of such a character as to call for the aid of the State to forward it in the exercise of a governmental function. * * * * The exemption of charitable institutions and schools has always been recognized as valid, because done in the exercise of a governmental function; but private undertakings, primarily for private gain or aggrandizement in any way, can not be protected individually and specifically by the government, but must come under general laws that operate alike upon all. We are of the opinion that the act of exemption is unconstitutional."

In the case of *Lancaster* v *Clayton*, 86 *Ky.*, 373, it was held that the legislature might confer the taxing power upon municipalities in such manner as it deemed expedient, but it could not confer any greater power than the State itself possessed, and must observe the restrictions and limitations of the organic law. In that case, Lancaster proposed to the City of Georgetown to erect at said place a fine hotel, if said city would exempt the property from the payment of municipal taxes for ten years. The offer was submitted to the voters of the city, and, the majority favoring it, the proposal was accepted by the city, and thereupon the hotel was built. The following year, however, the city had it assessed for city taxes, and Lancaster sought to enjoin their collection. In the charter of Georgetown, it was authorized to assess and levy a tax upon all the real estate in the city. No power to exempt property from taxation was attempted to be given in express words in the charter of the city. The Court of Appeals on this point observed: "We shall, however, waive the question whether this has been done by implication and proceed to a consideration of the power to do so, even with attempted legislative sanction, in a case like this one." After quoting the first section of

the bill of rights in the State Constitution of 1850, the court further observed: "It is a 'public privilege' to be exempted from taxation; and as the legislature can only authorize the imposition of the tax when it is for a public purpose, so, as a general rule, it also passes its constitutional limit when it attempts to confer exemption from taxation, save in consideration of public service. * * * The burden of taxation is justly a common one. Its object is to provide means for the protection and benefit of all; and, this being so, all should help to bear it. An exemption to one person is but additional burden to another. To take from one and give to another in a case of taxation, is, indeed, but robbery in a legalized form, and counter to the spirit and genius of our system of government. It is true the taxing power is a broad and liberal one and properly so. * * * It can not be used, however, to take from one person his property and give it to another one more favored, and this, too, although it may incidentally benefit the community. * * * Whatever directly promotes individual interest, although it may also tend incidentally to the public welfare, is essentially a private and not a public object. * * * Is the object of such a character that the municipality, in the exercise of a governmental function, can aid it? This is the true test of legislative power to exempt."

In the case of *City of Henderson* v. *McCullagh*, 89 *Ky.*, 448, the question raised was as to the exemption from city taxes of property belonging to a corporation, known as the "Henderson Female Seminary," which, however, belonged to one individual The court, in passing on the question, said (*Ib.* 452): "The legislature can not exempt property from taxation, save in consideration of public service, unless it be of a benevolent or charitable character. If the object directly promotes individual interest, and be essentially a private enterprise, then the exemption of its property from taxation by the legislature would be constitutional violation, and, as such, it would be the duty of the courts to declare it invalid."

In *Commonwealth* v. *Makibben*, 90 *Ky.*, 389, the court said: "If the legislature were to authorize the payment of a person's expenses in the performance of any enterprise, not a public service, there can be no doubt that such an act would be unhesitatingly declared unconstitutional, and to exempt a person's property from taxation in consideration of the same service, would be equally unconstitutional. To exempt a person's property from taxation, is to increase the burden of taxation upon all other taxpayers. The true test in such case is, has the legislature the constitutional power to authorize the direct payment for the services? If not, she can not exempt the person's property from taxation."

The Louisville Trust Company claims that by the amendment to its charter of May 15, 1886, it is given power to buy and sell notes secured by lien on real estate. This is not a general power to buy any kind of notes. Only real estate notes can be taken as security for a loan of money, and only such real estate notes can be bought by or pledged to said company, or placed on the footing of bills of exchange, and this power is coupled with the proviso that all such notes shall have been given in fulfillment of contracts fully executed

at the time of such purchase or pledge. These limited powers are not such as the general powers usually given to banks. It is urged, however, that by said amendment said company was authorized to establish a *savings department* in connection with its business, but it will be observed by the court that the business of this department is to be carried on "as a savings bank," the deposits are not to be less than one dollar, and the interest thereon is to be allowed at such rate as may be fixed by the by-laws, not exceeding four per cent. per annum. It is further provided that this "department" shall be kept distinct and separate from the other business of the company, and in a separate set of books.

In the case of *Bank of Redemption* v. *City of Boston*, 125 *U. S.*, 60–70, this court expressly held that savings banks, organized for the purpose of investing savings of small depositors, *are not banking institutions* in the commercial sense of that phrase.

The two amendments to the charter of the Fidelity Trust & Safety Vault Company of April 12, 1888, and May 15, 1890, under which said company claims it is placed practically on the same footing with banks, were both passed after the expiration of the period prescribed in the Hewitt Act for its acceptance. In other words, even if all that is claimed for this company in said two amendments be true, it occupies no better attitude than it would be in if chartered for the first time on April 12, 1888, or May 15, 1890, and no exemption under the provisions of the Hewitt Act growing out of these subsequent amendments can be sustained.

We insist that these two trust companies, which render no public service to the State or City of Louisville, have no immunity from State or municipal taxation under the Hewitt Act, or any provision of their charters. If either of the acts of the legislature on which they rely can be construed as intending to grant such exemption, it is in violation of the State Constitution of 1850. Nor are said trust companies entitled to the immunity claimed under their pleas of *res judicata*, that they are privies by agreement to the Louisville Banking Company in its prohibition suit.

On these points we can not do better than to quote from the opinion of the court below (*Louisville Trust Company* v. *Stone, et al.*, 88 *Fed. Rep.*, 407–9) as follows:

"In the case of *Louisville Trust Company* v. *City of Louisville* (*Ky.*), 30 *S. W.*, 991, Judge Grace, in the course of his opinion, expressed the view that this was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, and that this was the only ground upon which it could be excused from taxation under the old Constitution. It has been held by the Court of Appeals of Kentucky that it was competent to exempt banks, under that Constitution, because they did render public services. It is thus apparent that the question whether the trust companies had an irrevocable contract under the Hewitt Act (*Act Ky. May* 17, 1886), was not the same as that presented with respect to the banks. The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question can only exist where the two cases

involve the same questions of law and fact; otherwise, the attorney might conclude his client's rights by an event having no relevant relation to the merits of the controversy in which he is acting as attorney. Hence it follows that the contract of the City Attorney on behalf of the City of Louisville, in so far as it attempted to make the taxation of the trust companies depend upon the judgments in the three test cases of the banks, was beyond his authority, and that the trust companies can not rely on those judgments as *res judicata*. Indeed, the same conclusion may be reached irrespective of the City Attorney's authority. The point adjudged in the three cases was that *banks* accepting the Hewitt Act had an irrevocable tax exemption. The point at issue here concerns the tax exemption of the *trust companies*. This is a *different question*, as we have seen, and is not foreclosed, therefore, by the judgment in favor of the banks. The indispensible element in a successful plea of *res judicata* is that the point adjudged and the point at issue shall be the same. If the complainants can not rely on the bar of the prior adjudication, we must, of course, reach the same conclusion upon the question of irrevocable contract on its merits that we have reached in the case of the Northern Bank of Kentucky. The motion for preliminiminary injunction must therefore be denied, the demurrers to the bills sustained, and the bills dismissed."

There are other questions of subordinate importance, concerning which we might have presented our views, but realizing that this discussion on the main issues involved herein has been at greater length, perhaps, than was necessary, we now, in conclusion, ask, for the reasons urged in the foregoing brief, (1) that the decrees in cases Nos. 356, 357, 358, 359, 360, 361, 362, 363, 364, and 365 be reversed, with direction to the court below to dismiss the bills; and (2) that the decrees in cases Nos. 404, 405, 406, 407, 408, 409, 634, and 635 be affirmed.

All of which is respectfully submitted.

WILLIAM S. TAYLOR, *Attorney General,*
For Samuel H. Stone, Auditor, et al.

HENRY LANE STONE, *City Attorney,*
For City of Louisville.

APPENDIX.

AN ACT RESERVING POWER TO AMEND OR REPEAL CHARTERS AND OTHER LAWS.

[Statute of February 14, 1856.]

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: PROVIDED, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

SEC. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter, or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

SEC. 3. That the provisions of this act shall only apply to charters and acts of incorporations to be granted hereafter; and that this act shall take effect from its passage.

Approved February 14, 1856.

(*Session Acts* 1855–6, *vol.* 1, *chap.* 148, *p.* 15.)

HEWITT ACT.

ARTICLE II.

Stocks in Banks and Other Institutions.

SECTION 1. That shares of stock in State and National banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the Auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer

having in charge the affairs of such bank, institution, or corporation, who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

SEC. 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations, is invested, and pay into the Treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths:

"I . . . . . , swear (or affirm) that I am the . . . . . of . . . . . , and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits, or undivided accumulations of said . . . . . , and how or in what said surplus, undivided profits, or undivided accumulations is invested."

SEC. 3. If any such bank, institution, or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits, or undivided accumulations than an amount equal to ten per cent. of such capital stock, the excess of the amount so invested over the amount equal to ten per cent. of such capital stock shall be exempt from taxation for that year, and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

SEC. 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent

or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

SEC. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

SEC. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.

SEC. 7. If any bank, State or National, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

ARTICLE XII.

SEC. 5. Chapter 92 of the General Statutes, the act of March 28, 1872, entitled "An act to amend chapter 83 of the Revised Statutes, title 'Revenue and Taxation,'" the amendment to said act of March 28, 1872, entitled "An act to amend an act, approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax," approved April 19, 1873, the act approved April 2, 1878, title "An act to amend section 6, article 6, chapter 92, General Statutes," "An act to amend article 2 of chapter 92 of the General Statutes, title 'Revenue and Taxation,'" approved May 8, 1884, and all other acts, general and special, and parts of acts inconsistent herewith, or not in conformity herewith, are hereby repealed; but nothing in this act shall interfere with any existing local option, or any special or prohibition law in any county, nor with any local or general law for creating or collecting county levy, or with chapter 1315 of the acts of 1879–80, or with an act entitled "An act for the benefit of the Branch Penitentiary at Eddyville," approved April 7, 1886.

(*Session Acts* 1885–6, *vol.* 1, *pp.* 144–147; *Ib.*, 201.)

SECTION EIGHT (8), CHAPTER SIXTY-EIGHT (68), OF THE GENERAL STATUTES OF KENTUCKY.

To which, by section six (6) of the Hewitt Act, the provisions of the latter act concerning bank taxation are subject:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

(*General Statutes of Ky., Ed.* 1888, *pp.* 861–2.)

SECTIONS OF CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY.

[Adopted September 28, 1891.]

SEC. 3. "All men, when they form a social compact, are equal, and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege, or exemption shall remain subject to revocation, alteration, or amendment."

SEC. 170. "There shall be exempt from taxation public property used for public purposes; places actually used for religous worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusiveiy for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

SEC. 171. "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes

shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

SEC. 172. "All property not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

SEC. 174. "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses, or franchises."

SEC. 175. "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

SEC. 181. "The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions."

AN ACT RELATING TO REVENUE AND TAXATION.

[Approved November 11, 1892.]

ARTICLE I.

SEC. 2 (*Sec.* 4020, *Ky. Stats.*) "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

ARTICLE III.

Assessment of Certain Corporations.

SEC. 1. (*Sec.* 4077, *Ky. Stats.*) Every railway company or corporation, and every incorporated bank, trust company, guarantee or

security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation, or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district, where its franchises may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Auditor, Treasurer, and Secretary of State, who are hereby constituted a Board of Valuation and Assessment for said purpose.

SEC. 2. (*Sec.* 4078, *Ky. Stats.*) In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section sixteen of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred or common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

SEC. 3. (*Sec.* 4079, *Ky. Stats.*) Where the line or lines of any such corporation, company, or association, extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this State, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other

State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of the State, on business done in this State, and the entire gross receipts of the corporation, company, or association in this State and elswhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company, or association as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

SEC. 4. (*Sec.* 4080, *Ky. Stats.*) If the corporation, company, or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company, or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this State.

SEC. 5. (*Sec.* 4081, *Ky. Stats.*) If the corporation organized under the laws of this State, or of some other State or government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased, or controlled in this State, bears to the lines owned, leased, or controlled in this State and elsewhere, shall be the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which, such lines pass, or is operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town, or taxing district.

SEC. 6. (*Sec.* 4082, *Ky. Stats.*) Whenever any person or association of persons, not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the cerificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

SEC. 7. (*Sec.* 4083, *Ky. Stats.*) It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence the board may change the valuation as it may deem proper, and the action of the board shall be final.

SEC. 8. (*Sec.* 4084, *Ky. Stats.*) The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company, or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town, or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town, or taxing district for collection.

SEC. 9. (*Sec.* 4085, *Ky. Stats.*) The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.

SEC. 10. (*Sec.* 4086, *Ky. Stats.*) All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the State from them into the Treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

SEC. 11. (*Sec.* 4087, *Ky. Stats.*) Any corporation, or officer thereof, willfully failing or refusing to make reports as required by this chapter shall be deemed guilty of a misdemeanor, and for each offense shall be fined one thousand dollars, and fifty dollars for each day the same is not made after October first of each year.

SEC. 12. (*Sec.* 4088, *Ky. Stats.*) The individual stockholders of the corporations which are, by this article, required to report and pay taxes upon the corporate franchise shall not be required to list

their shares in such companies so long as the corporation pays the taxes on the corporate property and franchises as herein provided.

SEC. 13. (*Sec.* 4089, *Ky. Stats.*) Should any corporation required to make the report as hereinbefore provided be in the hands of, or under the control of, a receiver or other person, it shall be the duty of such receiver or other person to make the returns and valuations as hereinbefore required.

SEC. 14. (*Sec.* 4090, *Ky. Stats.*) Should any corporation fail to make the reports as required herein on or before the first day of October of each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the value of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

SEC. 15. (*Sec.* 4091, *Ky. Stats.*) All taxes assessed against any corporation, company, or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company, or association by the Auditor; and every such corporation, company, or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall shall bear interest at the rate of ten per cent. per annum; any such corporation, company, or association failing to pay its taxes, penalty, and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

SEC. 16. (*Sec.* 4092, *Ky. Stats.*) All banks and trust companies shall file the reports herein required by section two of this article, on or before the first day of March, 1893, and annually on or before March first thereafter. Said reports shall be made up to and including the thirty-first day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports or to pay said taxes as herein required, said banks and trust companies shall be subjected to the same fines and penalties as prescribed in section fifteen of this article.

ARTICLE XVI, CONCLUSION.

SEC. 1. All acts, and parts of acts, in conflict with this act are hereby repealed, except an act entitled, "An act to provide additional funds for the ordinary expenses of the State government," approved June four, one thousand eight hundred and ninety-two, and also except an act amendatory thereof, approved July six, one thousand eight hundred aud ninety-two.

(*Session Acts* 1891–2–3, *pp.* 277–366.)

MUNICIPAL TAXATION BY THE CITY OF LOUISVILLE.

SEC. 195. (*"Act for the government of cities of the first class," approved July* 1, 1893; *sec.* 2980, *Ky. Stats.*) "Each city shall raise a revenue from *ad valorem* taxes, and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for State purposes, and shall levy an *ad valorem* tax on same, not exceeding the rate and limits prescribed in the Constitution, and for school purposes not exceeding fifty cents on each one hundred dollars of taxable property therein, or such portion of poll tax or license fees as the council may designate; to levy a poll tax not exceeding one dollar and fifty cents on each adult male inhabitant thereof; and may impose license fees on stock used for breeding purposes, or franchises, trades, occupations, and professions, and provide for the collection thereof. All taxes and license fees shall be levied or imposed by ordinance, and the purpose or purposes for which the same are levied or imposed shall be specified therein, and the revenue therefrom shall be expended for no other purpose than that for which it was collected. The license taxes shall be collected by the commissioners of the sinking fund. All other taxes shall be collected by the tax receiver.

ORDINANCE No. 1.
(Part of Seetion One.)

AN ORDINANCE RELATING TO ASSESSMENTS.

Be it ordained by the General Council of the City of Louisville:

That, beginning with the first day of September, 1893, and on the same date in every year thereafter, the Assessor shall take the list of taxable property in the city of Louisville held or owned by every person in his or her own right, or as fiduciary, guardian, or agent, upon blanks in following form, substantially, to-wit.:

Statement and return of all lands and improvements, *and all personal property, not used or employed in some business or occupation from which a license tax is required*, subject to taxation in the city of Louisville.

Approved August 9, 1893.

ORDINANCE No. 2.
(Part of Section One.)
Levy or 1894.

AN ORDINANCE CONCERNING THE TAXES FOR THE FISCAL YEAR ENDING AUGUST 31, 1894.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That the following *ad valorem* tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements, *and on such personalty as is not used and employed in business paying a license tax for such business*, and in each case on each $100 in value, but shall not be levied upon any property exempt from taxation.

Approved December 21, 1893.

ORDINANCE No. 3.

AN ORDINANCE CONCERNING CERTAIN LICENSES IN THE CITY OF LOUISVILLE.

Be it ordained by the General Council of the City of Louisville:

That hereafter the following licenses shall be paid into the Sinking Fund of the City of Louisville:

Every manufacturer, distiller, brewer, merchant, or dealer, the owner or proprietor of every lithographing establishment, printing establishment, or bookbinding establishment, shall pay an annual license of five dollars, which shall be for the sale of not exceeding one thousand dollars of goods, wares, or merchandise; for the sale of more than one thousand dollars the tax shall be five dollars for the first thousand dollars of sales, and one dollar and fifty cents for each additional one thousand dollars, or fraction thereof, of yearly sales of all commodities. The person, firm, or corporation to whom the license has been granted shall, at the end of the year, pay the amount due for the license for the excess of sales over the estimate made at the time of the issuance of the license, under the same penalties as if the party had failed or refused to procure license.

SECOND. Every life, fire, or accident, or casualty and indemnity insurance company, title company, title insurance company, or abstract company doing business in the city shall, on or before the first day of February of each year, pay to the Sinking Fund the sum of two (2) dollars on every one hundred dollars of premiums received on business done in the city during the previous year.

THIRD. Each bank and trust company shall pay an annual license tax of 4 per cent. of its gross earnings, exclusive of rent from real estate paying taxes in the city of Louisville.

FOURTH. Each telephone company shall pay an annual license tax of 2 per cent. of its gross earnings. Each gas company, electric light company, or heating and lighting company, shall pay an annual license tax of 2 per cent. of its gross earnings, less the amount received for light and heat furnished the city at cost.

FIFTH. Each street car company shall pay an annual license tax of 2½ per cent. of its gross earnings.

SIXTH. Each person, firm, or corporation engaged in the business of retailing liquor in the city of Louisville shall pay an annual license of $150 therefor.

All licenses shall be paid in advance, and in every case where it is based upon a percentum of the earnings, or income of the person, firm, or corporation, the computation shall be made upon the earnings or income of said person, firm, or corporation for the year immediately preceding the time the license is to be dated, or is payable; and the person, firm, or corporation to whom the license shall be granted, shall, at the end of the year, pay the amount due for the excess over the estimates made at the time of issuing the license under the same penalty as if the party had failed or refused to procure a license.

Any person, firm, or corporation violating any of the provisions of this ordinance shall be fined not less than five dollars nor more than one hundred dollars for each offense; each day that the violation is continued shall constitute a separate offense.

SEVENTH. All annual liquor licenses shall be dated and begin from the first Monday in August of each year. Until the first Monday in August, 1894, applicants for liquor licenses, who have complied with the laws and regulations in such cases provided, may be granted license to expire on the first Monday of August, 1894, upon the payment of such proportion of the sum of $150 as the time said license has to run bears to one year. After the first Monday in August, 1894, persons proposing to begin the business of retailing liquor may be granted license until the next succeeding first Monday in August after said license is dated by paying their just proportion of the annual license tax as hereinbefore provided.

EIGHTH. All ordinances in conflict, or not in conformity with this ordinance, are hereby repealed. This ordinance shall take effect from and after its publication.

Approved January 29, 1894.

ORDINANCE No. 4.

(Part of Section One.)

Levy Ordinance for Fiscal Year Ending August 31, 1895.

AN ORDINANCE CONCERNING THE TAXES FOR THE FISCAL YEAR ENDING AUGUST 31, 1895.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That the following ad valorem tax is hereby levied for the fiscal year ending August 31, 1895, on lands and improvements, and on all personal property in the city of Louisville, as is held or owned by every person, firm, or *corporation* in its, her, or his own right, or as fiduciary, guardian, or agent, *subject to taxation for city purposes under the laws of Kentucky*, and under "An act for the government of cities of the first class," approved July 1, 1893, and in each case on each one hundred dollars in value, but shall not be levied upon any property exempt from taxation.

Approved December 22, 1894.

ORDINANCE No. 5.

Crediting Ad Valorem Tax Bills by Amount of License Paid.

AN ORDINANCE PROVIDING FOR CREDITING AD VALOREM TAX BILLS ON PERSONALTY BY THE AMOUNT PAID TO THE SINKING FUND AS LICENSE ON SAME.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That in collecting *ad valorem* tax bills on personalty for any year, it shall be the duty of the Tax Receiver of the City of Louisville to credit such tax bills by the amount of any license paid into the Sinking Fund of the City of Louisville by the tax-payer on the personalty represented by the tax bill.

SEC. 2. In giving such credits when the license has been paid for a period beyond the fiscal year for which the tax bill is made out, then the credit shall be given for the proportion only of said license

as is within the fiscal year of the tax bill, and the remainder, if any, shall be credited on the tax bills of the succeeding years in like proportion until the whole amount of the license is credited.

SEC. 3. In order to facilitate the crediting of the tax bills as herein provided for, it shall be the duty of the Secretary and Treasurer of the Sinking Fund of the City of Louisville, upon the demand of any person who has paid a license on personalty in lieu of *ad valorem* taxes, to issue to such person duplicate certificates showing the amount of license paid, by whom, and for what time, one of which said certificates shall be kept on file by the Tax Receiver and the other shall be by the Tax Receiver filed with the Controller of the City of Louisville.

SEC. 4. In making his settlements the Tax Receiver shall be allowed the credits so made in the tax bills, for money paid for license, in the same manner and to the same effect as if he had collected the tax bill entirely in money.

SEC. 5. Wherever a license was paid in any year in lieu of the *ad valorem* taxes, the Tax Receiver is directed to receive in payment the face of the tax bill for that year without interest.

SEC. 6. This ordinance shall take effect from and after its publication.

Approved August 6, 1895.

No. 356. and 357.

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JAMES H. McK

Nos. 356 and 357.

Brief of Humphrey & Davie, Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

Filed Feb. 17, 1899.

SAMUEL H. STONE, Auditor, &c., - *Appellants,*

VERSUS

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, - - *Appellee.* — No. 356.

CITY OF LOUISVILLE, - - - - *Appellant,*

VERSUS

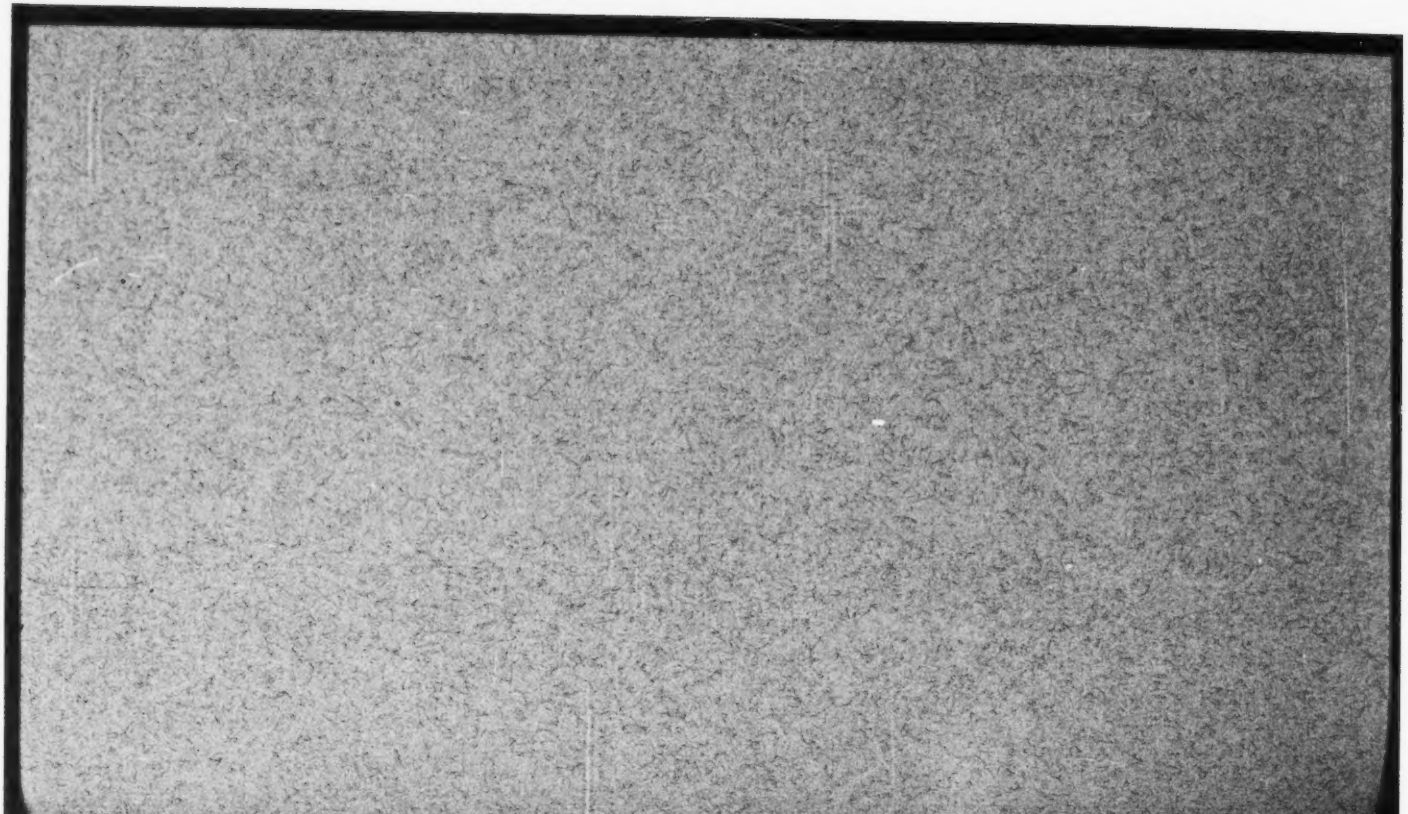
PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, - - *Appellee.* — No. 357.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Appellee.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Nos. 356, 357.

SAMUEL H. STONE, AUDITOR, &c., - - - - - - *Appellants,*

356 *VERSUS*

PRESIDENT, DIRECTORS, AND COMPANY OF BANK OF KENTUCKY, - - - - - - - - - - - *Appellee.*

AND

CITY OF LOUISVILLE, - - - - - - - - - - *Appellant,*

357 *VERSUS*

PRESIDENT, DIRECTORS, AND COMPANY OF BANK OF KENTUCKY, - - - - - - - - - - - *Appellee.*

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

The appellee in these cases is a corporation duly incorporated under a certain act and amendments thereto of the Commonwealth of Kentucky, and will be styled in this brief "Bank of Kentucky."

The appellants are, in the first named case, No. 356, Samuel H. Stone, Auditor, Charles Finley, Secretary of State, and G. W. Long, Treasurer of the Commonwealth of Kentucky, constituting what is known as the Board of Valuation and Assessment under the Act of November 11, 1892, and the city of Louisville, the county of Franklin, and the city of Frankfort.

The appellant in the second case, No. 357, is the city of Louisville.

Each of these cases was heard upon its merits by the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Justice Harlan, Circuit Judge Taft, and Circuit Judge Lurton constituting the court.

The decree of the court in the first case (R. No. 356, page 143) is as follows:

> "And it is now adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and Geo. W. Long be and they are hereby perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Jefferson County, or to any officer of the city of Louisville, or to the county clerk of Franklin County, or to any officer of the board of councilmen of the city of Frankfort, or the county of Franklin; and the defendants, The City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuation; and the complainant by making payments in accordance with the Hewitt law is discharged in full from all taxes to be exacted from it under any form or by any authority.
>
> "It is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata* relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky under the provisions of Article 2 of the Act of the General Assembly of the State of Kentucky, entitled 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said

act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the Act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2, and 3 of Article II, of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"And it is further adjudged that the complainant recover of the defendants its costs in this action expended."

The decree in the other case (R. No. 357, page 21) is as follows:

"And it is now adjudged, ordered, and decreed that the defendant, the City of Louisville, is perpetually enjoined and restrained from proceeding to collect the taxes for the years 1893 and 1894 upon the franchises of the complainant under the act of November 11, 1892.

"And it is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata* relied on by the complainant in its bill and as shown by the exhibit therewith, the said complainant has an established contract with the Commonwealth of Kentucky under the provisions of Article 2 of the Act of the General Assembly of the State of Kentucky, entitled 'An Act to amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of complainant; that by the terms of said contract the complainant and its shares of stock can not during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the

complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2, and 3 of Article 2 of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"It is further adjudged that the complainant recover of the defendant its costs in this action expended."

The opinion of the court in the first case may be found, R. 356, at pages 146, etc.; and in the second case, R. 357, page 24.

Statement.

The Bank of Kentucky was originally chartered by an act of the Legislature of Kentucky, approved February 23, 1834. It was therein provided that the bank should continue in existence until October 1, 1864. By an act approved February 15, 1858, it was provided that the charter should continue for twenty years from October 1, 1864. By an act approved February 1, 1872, it was provided that the charter should be extended an additional twenty-five years. It will thus appear that the charter of the Bank of Kentucky will not expire until October 1, 1909.

Neither the original charter nor any of the acts extending it reserved any right in the legislature to alter, amend or repeal. It was not until the year 1856 that the Legislature of Kentucky passed a general law reserving the right to repeal acts of incorporation.

It will thus appear that the Bank of Kentucky was chartered prior to this general act of 1856, but that its charter has been twice extended by acts passed since the year 1856.

The matter in contest is as to how the bank shall be taxed; what contracts it has in this respect; how these contract rights have been construed by the Kentucky courts; what has been the history and result of prior litigation between the bank and the

State and such municipalities as were concerned in the matter, and what is the present state of the law on the subject of the taxation of banks in general and as applied to this bank in particular.

Provision of Charter as to Taxation.

The 15th section of the original charter of the Bank of Kentucky is as follows:

> "Section 15. It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1836, and on the 1st day of July in each succeeding year, during the continuance of its charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank; which shall be in full of all tax and bonus; provided that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

The 15th section of the original charter of the Northern Bank of Kentucky, passed February 20, 1835, is as follows:

> "Section 15. It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1836, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank; which shall be in full of all tax or bonus; provided that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

Taking advantage of this right to increase the rate, the legislature, by an act approved February 12, 1836, imposed a tax of fifty cents on each share of stock in all banks.

Judicial Construction of these Charters.

The meaning of these clauses has been the subject of consideration by the Court of Appeals of Kentucky from a time very shortly after they went into effect.

In the case of Johnson v. Commonwealth, 7 Dana, 339, decided November 1, 1838, Chief Justice Robertson delivering the opinion, it appeared that Madison C. Johnson failed to fix on oath his property for *ad valorem* taxation, and one of the questions that arose for determination was, whether Mr. Johnson's stock in the Northern Bank of Kentucky was subject to taxation in his hands. Upon this subject the court said:

> "Nor do we believe that Johnson's stock in the Northern Bank is subject to be taxed in virtue of the Act of 1837. That act would embrace it if the legislature had the power to tax individual stockholders. But, in our opinion, there was no such power, and, therefore, we would not presume that the Act of 1837 was intended to embrace it, but, if it did, it is so far inoperative. The fifteenth section of the charter of the Northern Bank, Session Acts of 1834, page 173, is as follows: 'That it shall be the duty of the cashier of the principal bank, on the first day of July, 1836, and on the first day of July in each succeeding year, during the continuance of this charter, to pay to the treasury of this Commonwealth 25 cents on each $100 of stock held and paid for in said bank, which shall be in full of all tax or bonus; *Provided*, That the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank.' The bonus of twenty-five cents on each share of stock, to be paid by the corporation, and the reserved right to increase that tax on the corporation to fifty cents on each share, were, we think, understood and intended to be a limitation on the legislative power to tax the stock. This was a contract between the stockholders and the State, and so far as it was intended to operate, it is inviolable. The power to augment the tax to as much as fifty cents is a power to tax the corporation only, whereby all stockholders, non-resident as well as resident, would be subjected to an equal burden. There is no power, re-

served or resulting, to tax an individual stockholder, though he may reside within this Commonwealth. Such a tax would be unequal and therefore unjust, and the power to impose it would be inconsistent with the object of the fifteenth section of the charter, which was to secure the stockholders against the consequences of unlimited and capricious taxation of their bank stock."

Another bank, the Farmers Bank of Kentucky, was incorporated in the year 1850, and had a clause in its charter exactly like those we have above given. An effort was made by Greenup County to tax land belonging to the Farmers Bank of Kentucky for county purposes. On the 24th of November, 1869, in the case of the Farmers Bank of Kentucky v. Commonwealth and Greenup County, 6 Bush, 127, the question was considered by the Court of Appeals as to the meaning of this tax provision, and as to whether it prevented the State, either for itself or for county purposes, taxing the real estate of the bank. The court said:

"By a compliance with the section last quoted, the bank was to be discharged from the payment of all and every other tax. From the amplitude of the language no other rational construction can be given to it. The property which is attempted to be here taxed was doubtless taken by the bank or purchased in satisfaction, or part satisfaction, of a debt, and represents the assets of the bank to its value, and is no more subject to taxation than the notes or bills held by the bank, or money in its vaults."

The question was again fully considered by the Court of Appeals of Kentucky in various cases heard together, the first in style of which is Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 370, the opinion of the court being delivered June 5, 1888. It was there held that the charter of the various banks involved in that litigation—one of which was the Bank of Kentucky—constituted contracts between such banks and the State; that these contracts exempted the corporation from the payment of city and county taxes as well as from the payment of any other tax to the State, the city and county being parts of

the State and having no power to levy and collect taxes without authority from the State; that the acts of the legislature continuing the charter privileges and rights of the corporation beyond the time fixed by the original acts of incorporation did not have the effect of creating a new charter, but merely extended the life of the one already in existence, and therefore that the Act of February 14, 1856, by which the legislature reserved the right to alter and amend at pleasure charters thereafter granted, did not apply to acts extending charters granted prior to the Act of 1856; that even if these acts extending the charters could be regarded as creating new charters, it was manifest from the terms of the acts of extension that it was the intention to continue in force an irrevocable contract, and that the Act of 1856 did not apply.

This decision affirmed a judgment which had been rendered by the Franklin Circuit Court in a suit brought by the Bank of Kentucky against the Franklin County Court to enjoin the collection of county taxes; and by the Bank of Kentucky against the City of Frankfort, to enjoin the collection of city taxes.

The Hewitt Act.

In the year 1886 the Legislature of Kentucky passed a revenue statute which is known, and will be frequently referred to in the course of the argument of these cases, as the Hewitt Act.

The question of the taxation of banks is dealt with in the second article. It is given in full in the appendix to this brief. The first section of this article provides that the shares of stock in State and national banks shall be taxed seventy-five cents on each share thereof equal to one hundred dollars; and that the banks shall, in addition, pay on each one hundred dollars of so much of their surplus and undivided profits as exceed an amount equal to ten per cent of their capital stock, the same rate of taxation that is assessed upon real estate, and that this shall be in full of all tax—State, county, and municipal. The section provides for the ascertainment of the amount of this stock and sur-

plus, and requires reports to the Auditor of Public Accounts, to whom such payments are to be made.

The second section provides how reports are to be made by the banks.

The third section deals with the case of banks holding bonds or funds of the United States which are exempt from taxation.

The fourth section provides that each of the banks, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of the tax, and agree to pay the same as provided, and "to waive and release all right under the acts of Congress or under the charters of the State bank to a different mode or smaller rate of taxation."

This consent or agreement to and with the State of Kentucky was to be evidenced by writing, under the seal of the bank, and delivered to the Governor of the Commonwealth, and "upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

The fifth section provides that the banks may take the proceeding authorized at any time until the meeting of the next General Assembly, paying, however, the tax from the passage of the act.

The sixth section declares that this act shall be subject to the provisions of Section 8, Chapter 68, of the General Statutes.

The seventh section provides how banks refusing or failing to pay the tax imposed by the act, or failing or refusing to make the consent and agreement, shall be taxed; and concludes the section and the article with the following proviso:

> "Provided that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The Bank of Kentucky duly accepted the provisions of this law. The bills filed by it in both of the cases now under review show that down to and including the year 1885 it paid the fifty cents per share of its capital stock, and from 1886 down to 1893 paid its taxes under the Hewitt law to the auditor, and the tax on its banking houses to the municipalities in which such banking houses were situated.

BOARD OF VALUATION AND ASSESSMENT LAW OF 1892.

In the year 1891 a new Constitution was adopted in Kentucky. This instrument provided against exemptions or commutations of taxes. On the 11th of November, 1892, the legislature adopted a new revenue law. It is sufficiently printed in the statement of the case of Adams Express Co. v. Kentucky, 166 U. S. 175. By the terms of this enactment the intangible property as well as the franchise of all banking institutions was required to be valued by a Board composed of the Auditor, Treasurer, and Secretary of State. Upon the valuation thus fixed the banks were required to pay to the auditor the current rate of State taxation; and this Board (called the Board of Valuation and Assessment) was required to certify the values found by it to the various municipalities where the banks were exercising their franchise, and if there were two such municipalities, to apportion the value among those municipalities in the proportion of user. Section 4092 provides that the banks shall file their reports on or before March 1st, and pay their taxes on or before July 1st of each year.

The Bank of Kentucky has its principal office at Louisville, and a branch at Frankfort.

Under the terms of this law the Board would make a return, in reference to the Bank of Kentucky, to the city of Louisville, county of Franklin, and city of Frankfort.

After the new law had gone into effect the Bank of Kentucky made tender to the auditor of the full amount of tax due by it

under the Hewitt law, as well as the amount of tax due by it under its charter; which was less than that under the Hewitt law. The auditor refused to receive either of these amounts, but accepted only the amount which would be due under the new system. Certain proceedings were taken to test the validity of this law, as will be hereafter more fully explained. The result of these proceedings was that the Court of Appeals of Kentucky, in an opinion delivered June 1, 1895 (97 Ky., page 590), after a most elaborate consideration of the question, held that the banks were entitled to the protection of the contract made by them under the Hewitt law, and in various forms of affirmance and reversal, of the many cases which were considered together, enjoined the municipal authorities from exacting any greater rate. The result was that the auditor accepted, in July, 1895, the rate of taxation from the bank calculated under the Hewitt law, and called on the bank to pay the difference between what had been paid by it to the State under the Valuation and Assessment law and the Hewitt law, for the years during which this litigation had been going on; and these payments were accordingly made.

In 1896 the taxes were paid under the Hewitt law.

The decision rendered June 1, 1895, was by a divided court, four judges holding that the Hewitt law was still in force, and the banks protected by their contracts under it; and three judges holding the contrary. Subsequently the Court of Appeals has, by a similar division—four to three—held to the contrary in certain other cases which had gone up to that tribunal. (Deposit Bank v. Daviess Co., 39 S. W. 1030.) The various municipalities, taking this to be a reversal of the former holding, began to press to have the taxes assessed and paid under the Valuation and Assessment law.

STATEMENT AS TO LITIGATION.

Under these circumstances the Bank of Kentucky, on April 17, 1897, filed two bills of complaint in the Circuit Court of the United States for the District of Kentucky. To the first of these bills it made parties defendant the three members of the Board of Valuation and Assessment, viz., the Auditor, Secretary of State, and Treasurer of the State of Kentucky; the City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort. To the second bill it made defendant the City of Louisville only.

After stating the character of the defendants and the incorporation of the complainant, the bill in case 356 sets forth literally the 15th section of the charter in reference to taxation, and alleged that the meaning of its provisions had been determined by a settled course of decision by the Court of Appeals of Kentucky, beginning with an adjudication November 1, 1838.

The bill then shows the passage of an act of March 18, 1876, and the effort under that law of the county of Franklin to tax the bank for county purposes, and an effort about the same time by the Board of Councilmen of the city of Frankfort to tax the complainant, and the steps taken in two suits filed by the bank—one against Franklin County and the other against the city of Frankfort—are given, and it is shown that in each of these suits the bank obtained a judgment upholding its charter right to commute its tax at 50 cents per share.

These judgments are pleaded and relied on as conclusive upon the defendants. Their terms and effect will be more fully explained hereafter.

The bill then gives an account of the passage of the Hewitt law and the acceptance of its provisions by the complainant, and its compliance with the taxing scheme therein provided for down to the time of filing the bill. It then states the passage of the Act of November 11, 1892; what is required thereby in the way

of reports, assessments by the board, and apportionment of such assessments among the several taxing jurisdictions entitled to a share of such tax from the complainant, if the complainant is subject to the terms of that law.

The complainant then shows what would be the difference between paying its taxes under the Hewitt law and under the new law, showing beyond controversy that more than $2,000 is involved in the litigation.

The complainant then relies upon the contract made between it and the State under the Hewitt law, and claims that this system is violative of such contract.

It is alleged that after this Act of November 11, 1892, went into effect certain litigation was begun by the Bank of Kentucky against the city of Frankfort and Franklin County, and also against the city of Louisville—one suit against each—the issue in each suit being the right of the bank to be protected under the Hewitt contract and to prevent any taxation except by virtue of the terms of the Hewitt law. And it is alleged that in all of these cases the bank was successful: in one of them, in the court of first instance and also in the Court of Appeals; and in the others, while unsuccessful in the court of first instance, yet it was successful in the Court of Appeals. And it is alleged that appropriate judgments had been entered in all of these cases, establishing the right of the Bank of Kentucky to commute its taxes according to the system prescribed by the Hewitt Law.

These cases just mentioned were those passed upon by the Court of Appeals in an opinion by Chief Justice Pryor, which will be more fully referred to hereafter. (97 Ky. 590.)

The bill alleges the compliance by the Bank of Kentucky with the provisions of the Hewitt law in the payment of taxes, but states that, notwithstanding the rights of the complainant as thus adjudicated, the defendants are threatening to assess the value of its property and franchise under the Act of November 11, 1892, and to certify such value to the three municipalities for

taxation. And the court is asked to enjoin the Board of Valuation and Assessment from either so assessing or so certifying for the years 1895, 1896, 1897, and 1898, and for all the other years until the charter of the bank shall expire.

The second suit was filed by the Bank, in which the City of Louisville alone is a party. In this case the allegations of the bill are substantially similar to those mentioned above, except that it appears that the Board of Valuation and Assessment had assessed the franchise of the bank for the years 1893 and 1894, and had certified such assessment to the City of Louisville; and the object of this suit is to enjoin the State from attempting to collect taxes under this assessment and certification.

All the defendants appeared to these bills, and the issues of law and fact were raised by demurrers, answers, and replications. The proof was entirely of a documentary character and put into the record by stipulation. Among other things it was expressly stipulated that the bank had accepted the provisions of the Hewitt law.

The defenses urged to the bill in the court of first instance, and which are still insisted upon here, must be examined in detail.

The Jurisdiction of the Circuit Court.

The defendants (now appellants) challenge the jurisdiction of the court.

That there is original jurisdiction in the Federal courts in such cases, without regard to citizenship, is almost too plain for argument. The Act of August 13, 1888 (Supplement R. S. 611), provides:

> "The Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States."

There can be no doubt that much more than $2,000 is involved in each of these cases. The bills of complaint state in each instance the contract between the Commonwealth of Kentucky and the Bank, both as contained in the charter of the Bank and as made in pursuance of the Hewitt law.

They further set forth the effort upon the part of the State, by the Constitution of 1891 and the revenue law of November 11, 1892, to abrogate this contract.

Under these circumstances there can be no doubt that we have a case which arises under the Constitution of the United States.

Two grounds of objection are made to the jurisdiction of the court. One of these is that this is a suit against the State of Kentucky. Many authorities are cited upon this point by the learned counsel for the appellant, the City of Louisville. It seems to us not necessary to review them, because they are considered in the case of Pennoyer v. McConnaughy, 140 U. S. 1. Indeed, so absolutely does this case seem to settle the law upon the subject that it can be no longer open to challenge. In Re Tyler, 149 U. S. 190.

The case of Adams Express Co. v. Ohio, 165 U. S. 196, was as much a suit against the State of Ohio as can possibly be predicated of the case at bar. Although the jurisdiction of the court of the action as an equitable one was fully considered by Judge Taft upon the original hearing (Western Union Telegraph Co. v. Poe, 61 Fed. Rep. 452) and by the Circuit Court of Appeals of the Sixth Circuit on appeal (Sanford v. Poe, 69 Fed. Rep. 546; S. C., 37 U. S. Appeals, 378), and the decree of both courts was here affirmed, no question was anywhere made as to this being a suit against the State of Ohio.

So, also, this court, in Adams Express Co. v. Kentucky, 166 U. S. 172, affirmed a decree rendered by Judge Barr, sitting in the United States Circuit Court for the District of Kentucky, and pronounced by him on the basis of his opinion as reported in Western Union Telegraph Co. v. Norman, 77 Fed. Rep. 20. In the opinion at the Circuit, Judge Barr discusses the question

of jurisdiction in equity, but neither before that learned judge nor before this court does the question seem to have been raised as to the suit being one against the State, and yet it was the case of bills in equity filed by the Western Union Telegraph Co. and the Adams Express against the very State Board of Valuation and Assessment, acting under the very law in controversy in these causes.

We believe it would be easy to cite a multitude of cases of this character in which the Federal courts of first instance and of final resort have taken jurisdiction and pronounced decrees for or against the complainants without even adverting to the proposition that the suit was really against the State.

The second ground of objection is that, as the court in this particular cause did not decide, as an original proposition, that there was a contract inviolable in its character between the Bank of Kentucky and the State, the terms of which the Bank of Kentucky was entitled to have enforced, but rested the right of the Bank of Kentucky to relief upon the ground that the existence and terms of this contract had been theretofore conclusively adjudicated, this deprived the court of jurisdiction to consider the cause. It is true that in another case submitted at the same time as this one to the court, it was decided that as an original proposition the contract made by the banks under the Hewitt law was subject to cancellation by the State of Kentucky. In the case now at bar this question as an original one was not decided, the one way or the other, because the court found that the contract insisted upon by the Bank of Kentucky had by previous adjudication been conclusively established. The complainant, the Bank of Kentucky, came into the Federal tribunal and alleged that it had a contract with the State by which it was entitled to commute its taxes on a certain basis; that this contract the State had, by certain legislation, attempted to avoid. As evidence of the existence of this contract and its terms the complainant presented certain final adjudications. This evidence the learned Circuit Court found conclusively established the

allegations of the Bank of Kentucky that the contract did exist and what were the terms of the contract. The argument now is that while it would have been competent for the Circuit Court to receive other evidence of the existence of the contract, yet it was not competent for that tribunal to receive this form of evidence. We find it difficult to take hold of such a proposition.

This court, in New Orleans v. Citizens Bank, 167 U. S. 371, did examine and put its decision upon exactly this character of evidence. The distinction is attempted to be made between the case at bar and that case, because it is said that in the Citizens Bank case the inimical legislation was passed after the Citizens Bank had obtained its judgments; whereas, in the case at bar, the inimical legislation was passed prior to the time that these bills were filed.

The proposition may be stated thus: If the State of Kentucky shall hereafter pass any laws violating the bank's contract under the Hewitt bill, the bank may have relief in the Federal court and may prove the existence and the terms of its contract by prior adjudications thereon. But it can not do so as to any legislation passed prior to the time when it obtained these adjudications, even though that legislation be the very legislation involved in the suit in which the bank obtained its adjudication. Here again we find a proposition difficult to argue.

We submit, therefore, that the court did have jurisdiction of the suit against the Board of Valuation and Assessment and the municipalities joined as defendants with them, and, *a fortiori*, had jurisdiction of the other cause in which the city of Louisville alone was sued. We hardly think it will be contended that the city of Louisville is the Commonwealth of Kentucky.

The Jurisdiction is in Equity.

The next question is as to whether there is a jurisdiction in equity.

The text-books state this jurisdiction with great plainness. The following is Section 530 of 1 High on Injunctions:

> "An important exception to the general doctrine of non-interference by injunction against the collection of the revenue because of illegality in the tax is recognized in that class of cases where the relief is sought against a tax assessed upon property which has been exempted by law from taxation. Indeed, the exception has been so uniformly recognized as to become of itself a governing rule in the class of cases now under consideration. And it may be laid down as the established doctrine of the courts that the attempted enforcement of a tax upon property which has been exempted by proper legislative authority from the burdens of taxation constitutes a grievance of so irreparable a nature as to merit preventive relief by injunction. And where an act of legislature, held by the court to be constitutional, exempts certain property from taxation, an injunction will be allowed against the enforcement of a tax upon such property. So an injunction may be granted against the assessment of the property of a corporation where, under the terms of its charter as construed by the court of last resort of the State, the property is exempt from taxation."

The following is Section 672, 1 Spelling on Extraordinary Relief:

> "Equity will enjoin the collection of a tax levied upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy."

We are aware that this court has settled, in the case of Shelton v. Platt (139 U. S. 591), that mere illegality will not be sufficient for an injunction against a tax; but it has never held, so far as we know, that the existence of a contract between the State and a citizen is not in itself sufficient to justify the interposition of a court of equity in enjoining its violation or by an injunction enforcing its specific performance. Jurisdiction in such a case as this seems to have been assumed as a matter of course in Shelby County v. Union Bank, 161 U. S. 156.

In Kentucky the jurisdiction of a court of equity, under the circumstances here set out, to enjoin a tax or an unauthorized assessment, is clear. (Gates v. Barnett, 79 Ky. 296; Baldwin v. Shine, 84 Ky. 510; Norman v. Boaz, 85 Ky. 560.)

In Western Union Telegraph Company v. Norman, 77 Fed. Rep. 21, Judge Barr maintained his equitable jurisdiction upon this ground, among others: that it was the uniform practice in Kentucky to allow an injunction to restrain either the assessment or collection of illegal taxes, and that the equity jurisdiction in such cases had been frequently sustained by the Court of Appeals.

In Covington Bank v. Covington, 21 F. R. 491 (another Kentucky case), Mr. Justice Matthews held that such remedy was clear.

In one of the cases under consideration the Bank of Kentucky is complainant and the Board of Valuation and Assessment, the City of Louisville, the County of Franklin, and the City of Frankfort are parties defendant.

This suit is brought to prevent the Board of Valuation and Assessment from making a return of the proportionate part of the franchise of the Bank of Kentucky to the city of Louisville and city of Frankfort and county of Franklin for taxation by the three municipalities. The other case is a suit to enjoin the city of Louisville from collecting taxes for the years 1893 and 1894.

The Supreme Court of the United States, in Cummins v. Bank, 101 U. S. 156, held that where a State statute allowed a suit to enjoin taxes, the Federal Court would administer the same relief. This case is commented on in Western Union Co. v. Poe, 61 F. R. 452, where the court does not apply it simply because the suit was not brought in such a way as to comply with the terms of the statute.

In other words, the municipality to whom would apply the tax if collected was not made a party defendant in the suit against the assessing board; whereas here not only the assessing board but the municipalities who would receive the tax are made parties.

The city of Louisville is a city of the first class.

Section 3008 (Kentucky Statutes), which is one of the pro-

visions contained in charters of cities of the first class, is as follows:

> "Any court of competent jurisdiction, not inferior to a circuit court, may, in the established modes of proceedings, and upon existing principles of law or equity, give redress against unlawful distraints or garnishments of rents that may be wrongfully made or threatened under color of this act; but no injunction shall be granted in such proceeding except by the court or its judge, nor otherwise than upon notice to said city, and after a hearing."

It would seem that the language, "in the established modes of proceedings and upon existing principles of law and equity," is susceptible of only one interpretation. As stated above, it has been long settled and was fully determined at the time this Section 3008 was enacted, that the proper mode of proceeding, and the principles of equity in reference to illegal taxation (whether against its assessment or collection), was by a suit in equity for an injunction. It would, therefore, seem to be plain that so far as any of these suits involved taxation by the city of Louisville, we have a statute which comes exactly within the decision of Cummins v. Bank, 101 U. S. 156.

This would seem to settle beyond any reasonable doubt the jurisdiction of the court in both of the cases under consideration.

Again, if the Board of Valuation and Assessment is allowed to proceed, it will, under the law, apportion taxation against the Bank of Kentucky to each of the three municipalities: City of Louisville, County of Franklin, and City of Frankfort. It would seem that we have here a clear jurisdiction on account of the multiplicity of suits in which necessarily the Bank of Kentucky would be involved if the assessment were made.

That this is ample ground of jurisdiction appears in Western Union Company v. Poe, 61 F. R. 452; Sanford v. Poe, 69 Federal Rep. 547; Western Union Telegraph Company v. Norman, 77 Federal Rep. 21; and the many cases from the Supreme Court cited in those cases.

It is to be observed that where the Federal courts have refused to entertain jurisdiction in equity, to enjoin an illegal tax, it has almost if not always appeared that the statutes of the State prohibited such suits, and pointed out another remedy.

In Kentucky we find not only no such statute, but we have no such policy. On the contrary, the State courts do interfere by injunction and have established it as the appropriate method of relief.

There can therefore be no ground of public policy which would induce this court to withhold its hand; and it would seem to us that if the Federal court would administer equitable relief in pursuance of a State statute, it would likewise and as readily do so in pursuance of a settled course of State adjudication and procedure.

These bills, however, have been careful to set out that there would be an irreparable injury committed if these assessments were allowed to be made, and the collecting officer were allowed to proceed to collect taxes under them.

These institutions are banks, and of course have the most of their capital invested in loans made to their customers. Any disturbance of this relation must necessarily be a source of irreparable injury to the bank. If the court declines an injunction, how, under the laws in reference to the collection of taxes, can the complainants be proceeded against?

In regard to the taxes which would be collected by the county of Franklin, we find, by Section 4129, Kentucky Statutes, that such taxes are collected by the sheriff; by Section 4148, that he is allowed to distrain personal property; by Section 4151, to sell the real estate of the bank; and by Section 4184, to serve process of garnishment upon any and all persons who may be indebted to it, and require them to answer as to the amount of such indebtedness, and to pay the same into court. We give these sections in the appendix.

The method of collection of taxes in cities of the first class is, under Section 3002, by distraint of goods; and by Section 3004,

by garnishments of rents. This only applies to the city of Louisville.

The city of Frankfort is a city of the third class. By Section 3390 the collector has the same power of distraint and garnishment as the sheriff has for State taxes.

It will thus be seen, from the review of the provisions in regard to the collection of taxes against the Bank of Kentucky, outside of Louisville, that unless an injunction shall go there is every danger not only of a multiplicity of suits but of irreparable injury.

We make the following extract from Judge Taft's opinion in this case:

> "If it were necessary, we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it? In Osborn v. Bank of United States, 9 Wheat. 738, 742, Chief Justice Marshall said: 'The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege.' See also Morris Canal and Banking Co. v. Jersey City, 1 Beasley, 227; High on Injunction, Section 530. In addition to the suits for future taxes there is also danger of harassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the Act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief."

The right of the Bank of Kentucky, under its original charter, to pay 50 cents per share in lieu of all other taxes, and the substituted right, under the Hewitt Bill, to pay 75 cents per share in lieu of all other taxes, may be called either a "privilege"

or a "franchise." Such a right is said to be a "franchise" in Given v. Wright, 117 U. S. 656. It is said to be a "privilege" in Humphrey v. Pegues, 16 Wall. 247, and Tennessee v. Whitworth, 117 U. S. 146.

In Osborne v. Bank of United States, 9 Wheaton, 742, Chief Justice Marshall shows that such a franchise or privilege, when subjected to continuous attack, will be protected by injunction.

We have been curious to look through the decisions of this court to see whether in any of them the right to go into a court of equity for an injunction for the protection of a contract relating to taxation has ever been denied. We find no case denying it. To the contrary we find a very large number of cases in which this very remedy has been sought, and in none of which the jurisdiction of the court has been doubted. We give a list of these cases in an appendix to this brief. We do not pretend that it is an exhaustive one, but we do believe that one sentence from an opinion of this court is applicable to all of these cases.

In County of Calhoun v. American Emigrant Co., 93 U. S. 124, it is said:

> "Power is vested in the Circuit Court to enjoin the collection of a municipal tax where it appears that the assessors acted without authority of law and in violation of a special contract between the municipality imposing the tax and the taxpayer."

Manifestly the right can not be less when the contract has been made with the State.

This court has declined to exercise jurisdiction in equity to enjoin the assessment and levy of a tax in various cases. These are, so far as we have found them, Dows v. Chicago, 11 Wallace, 108; Hannewinkle v. Georgetown, 15 Wallace, 547; Railroad Tax Cases, 92 U. S. 575; Milwaukee v. Koeffler, 116 U. S. 219; Shelton v. Platt, 139 U. S. 591; Allen v. Pullman Palace Car Co., 139 U. S. 659, and, possibly, P. C. C. & St. L. Co. v. Board of Public Works, 172 U. S., page — (S. C., 19 S. C. R. 92).

Without reviewing these cases it may be stated in reference to them that there was ground in each one of them for the imposition of some tax upon the property of the complainant, but that the allegations in the bill were to the effect that the tax sought to be imposed was illegally imposed or the method of ascertaining the value of the complainant's property for taxation unwarranted by law. In none of the cases was any such feature presented as a contract with the State under which the total taxes due by the complainant to the State and to the several municipalities in the State had been commuted into a gross sum to be paid to the State as in lieu of all other taxation.

We find no case in which this feature is presented where a court of equity has denied relief. The ground upon which the decisions above quoted have been rested is, we think, well showed by an extract made in the last case cited—P. C. C. & St. L. v. Board of Public Works—from the case of State Railroad Tax Cases, 92 U. S. 613. Mr. Justice Miller there says:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that in addition to the illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors of excess in valuation or hardship or injustice of the law or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to the said collection of the tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment or to direct another to be made by the proper officers of the State. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court when so acting. The levy of the taxes is not a judicial function. Its exercise by the constitutions of all the States and by the theory of our English origin is exclusively legislative. A court of equity is therefore hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of in

whole or in part, without any power of doing complete justice by making or causing to be made a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in a proper manner."

In the case at bar the sole question is as to whether the Bank of Kentucky, having paid in full its taxes under the Hewitt law to the State, is entitled, under its contract, to exemption from municipal taxation. There is no complaint here of an illegal assessment in the sense that there might have been a legal assessment. There is no complaint here of an excessive valuation or of any irregularity in the imposition of the tax. The whole case turns upon the right of the Bank of Kentucky to enforce its contract.

It will not be denied that one of the well-recognized heads of equity jurisdiction is the avoidance of a multiplicity of suits; and, further, where a party has established his right by litigation, this gives to a court of equity the authority to protect such a party from the harassment of new litigation. These particular suits are respectively the sixth and seventh suits brought by the Bank of Kentucky for the protection of its contract rights, in every one of which it had been successful.

As will be shown hereafter, in giving a history of this litigation, the bank brought two suits prior to the passage of the Hewitt law to protect the contract right contained in its charter, and the Court of Appeals decided in its favor in both these suits—one being against the City of Frankfort and the other against the County of Franklin. Since the passage of the Hewitt law and the passage of the act of November 11, 1892, it has brought three more suits—one against the County of Franklin; one against the City of Frankfort, and one against the City of Louisville; and in all these it has been likewise successful by the final judgment of the Court of Appeals of Kentucky.

The learned counsel for the city of Louisville holds out the

hope to us that if the court shall dismiss this cause on the ground that a court of equity has no jurisdiction, it will bring only one more suit against the Bank of Kentucky; but while no doubt he will be as good as his word, yet this will no more bind his successors than have the former attempts to invade the contract rights of the Bank of Kentucky bound him.

If, therefore, a case can be made where a litigant is entitled to have an end put to litigation, it would seem to us that this is the case.

It is, moreover, to be observed that these suits are not to enjoin the collection of State taxes, but to prevent the collection of municipal taxes in a case where the State has confessedly received more than it would have received if it had not determined upon the policy of taking the larger sum for itself and depriving the municipality of any right to tax in consequence of this arrangement.

In 1 High on Injunctions, Section 536, *et seq.*, the authorities are examined and show that a court of equity will take jurisdiction in a suit to restrain municipal taxation where it will not do so to restrain the collection of the State revenue; and this circumstance is adverted to by Mr. Justice Miller in his opinion in State Railroad Tax Cases, 92 U. S. 615. (See, however, Milwaukee v. Koeffler, 116 U. S. 224.)

As one of the grounds for relief we claimed in the Circuit Court that if we awaited a suit by the municipality, we might subject ourselves to heavy penalties. This was based upon the language of Section 4091 of the Kentucky Statutes, which is as follows:

> "All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the Auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and

> thereafter such tax shall bear interest at the rate of ten per cent per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

It is insisted in the brief for the city of Louisville that this section does not apply to suits for municipal taxes. It is fair, however, to say that the penalty of ten per cent, with the additional ten per cent per annum prescribed by this section, is claimed by the city of Louisville in suits now pending for taxes assessed by the Board of Valuation and Assessment; and while we have contested the right to recover these penalties, the question is yet an open one.

As another ground of equitable jurisdiction it was claimed by us in the Circuit Court that Section 3008 (being one of the provisions of the charter of the city of Louisville) recognized the right to enjoin an illegal tax. The language of that section we again quote, as follows:

> "Any court of competent jurisdiction not inferior to a Circuit Court, may, in the established modes of proceedings and upon existing principles of law or equity, give redress against unlawful distraints or garnishments of rents that may be wrongfully made or threatened under cover of this act, but no injunction shall be granted in such proceeding except by the court or its judge, nor otherwise than upon notice to the said city and after a hearing."

It is contended that this does not apply to the collection of tax bills made out upon assessments of the city assessor. It is difficult to understand or see the force of this argument.

The first clause of Section 181 of the Constitution of the State of Kentucky is as follows:

> "The General Assembly shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

The Court of Appeals of Kentucky has recently held that it was constitutional for the legislature to provide a State Board of Valuation and Assessment which should value the franchises of corporations for purpose of city taxation, but no one has ever denied that the taxes imposed upon these valuations for the purposes of the local municipalities must be levied by their respective boards.

The city of Louisville has therefore no right to collect any taxes except as they are levied by the general council, and the whole right of the city to collect taxes upon valuations made by the Board of Valuation and Assessments comes from the general levy ordinance, which includes these values as well as those fixed by the city assessor.

Moreover, the city of Louisville has passed an ordinance requiring the city assessor to make out against all corporations the tax bills for each fiscal year on the amount of the assessments made by the State Board of Valuation and Assessment, and has required him to do so for the same fiscal year, at the same rate of *ad valorem* taxation, and for the same purposes levied by ordinance of the city for the representative fiscal years in and for which the assessments by the State Board of Valuation and Assessment have been or may be respectively made; and these bills are to be made out on the same forms and to be authenticated by the city assessor in the same manner as other tax bills, on assessments made by him, are required to be made by the levy ordinance for the same fiscal year; and these tax bills are required to be made out, authenticated by the city assessor, and listed by him as soon as practicable with the receiver of city taxes, for collection as provided by law.

What reason there is, therefore, to contend that there can be no distraint under these tax bills as well as under any other tax bills we are unable to perceive. If there is no right to distrain, there would be no right to sue; for the right to sue is no broader than the right to distrain.

The case of the L. & N. R. R. Co. v. City of Louisville, 166

U. S. 709, has no application whatsoever to this question. That case arose under an act passed prior to the present Constitution of the State of Kentucky; and, furthermore, the assessments against railroads and railroad property and how taxes thereon shall be collected is left to the general discretion of the Legislature of Kentucky by the express provision of Section 182 of the Constitution.

The case at bar, therefore, is brought squarely within those cited by the learned Circuit Court in its opinion in this case.

The cases cited by counsel to show that in Kentucky taxes voluntarily paid which are illegal can be recovered, do not so hold. These are all cases in which the payments were made in *ignorance* of the invalidity of the tax, and involve the question of when money paid under *mistake* of law can be recovered.

The Bank Has a Contract Commuting Taxation.

The first question upon the merits of these cases is, has this bank a contract with the State which can not be repealed? If so, what is that contract?

The State Had the Right to Make the Contract.

Our first proposition is that the provision of the charter originally constituted a contract, and this contract the State had the right to make and no right to retire from. We know of no stronger way of enforcing this proposition than by an extended quotation from the case of the Franklin County Court v. Deposit Bank of Frankfort. (87 Ky. 379.) The court is there speaking of the provision in the original charter of the Bank of Kentucky, which we have quoted literally in the statement of the case. It says:

> "The appellant's first contention is that the legislature had no constitutional power to exempt the appellee from the common burden of taxation except 'in consideration of

public services.' It contends that the exemption of the appellee from all taxation, except fifty cents on each one hundred dollars of its capital stock, was not 'in consideration of public services,' and therefore void.

"At the time the appellee was chartered, and for years afterwards, the Federal Government issued no paper currency. Banks and banking were creatures of the respective States. It was the policy of this Commonwealth to charter banks, with authority to issue paper currency, based upon a gold and silver redemption, upon the demand of the holder. The issue of these banks constituted, in the main, the circulating medium in the Commonwealth for individual, commercial, and public uses. While the aggregation of capital for banking purposes was, on the part of the projectors, for the purpose of individual gain, yet the Commonwealth accepted the overture as auspicious to the purpose of furnishing a currency as stable as, in the nature of things, it could be made, for the private, commercial, and public benefit of her citizens; also to aid her in the management of her fiscal affairs, which not only consisted in the providing of means to meet the ordinary administration of State affairs, but sometimes extended, at least might extend, to the borrowing of money to meet any extraordinary or unforeseen emergency. Therefore, we should hesitate to decide, were it material to decide the question, that the granting of the charter to the appellee, and the fixing of a specific tax of fifty cents on each share of its capital stock, was not in consideration of public services. But the right of the State to grant the charter to the appellee, and exempt it from the payment of all taxes, except fifty cents on each share of its capital stock, rests upon the power of the State to make, for a valuable consideration, a valid and irrevocable contract.

"The State of Kentucky, in the management and control of her affairs, in her relation to the other States, and in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States to the Federal Government, or are denied to the States, is sovereign by right. It is by virtue of her sovereignty that she has the power to contract. No binding contract can be entered into, except by virtue of sovereign power. It is by this power that the State makes contracts with individuals, that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign.

"Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contracting, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration coming to him from the other party to the contract, he surrenders something, and receives something in its stead which he deems an equivalent. Whether the one or the other has, in fact, received an intrinsic equivalent for that with which he has parted, is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevocably binding. In thus contracting, he does not surrender his sovereign power; he merely exercises it. Upon precisely the same principle the Commonwealth contracts. If her contract is without any valuable consideration, it is a *nudum pactum*; so is that of the citizen; but if there is a valuable consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State, possessing the power to make, for a valuable consideration, a binding contract, falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts, she stands upon precisely the same footing that individuals do in reference to their contracts—she shall pass no law impairing their obligation. In accordance with the foregoing views, the Supreme Court of the United States, ever since the Dartmouth College Case, 4 Wheaton, 518, have consistently held that the creation of a corporation, especially banks, by the legislature of a State, whereby it was agreed that the corporation, in consideration of paying to the State a specific tax or bonus, was to be released from the payment of all other taxes, constituted a binding contract, from which the State could not recede without the consent of the corporation; unless the State, in making the contract, expressly reserved the power to alter or amend it; or unless there was a general law in force, at the time of making the contract, which authorized the State, by subsequent legislation, to alter or amend it, and that there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. (State Bank of Ohio v. Knoop, 16 Howard, 369; New Jersey v. Yard, 95 U. S. 104; Farrington v. Tennessee, 95

U. S. 679.) This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recognized by the courts of last resort of all the States, that a decision by us holding the contrary would be regarded as eminently sporadic."

The Extent of This Contract.

Our second proposition is that this provision in the charter of this bank protected it and its stockholders from any other taxation — State, county, or municipal. That this has been the uniform construction of this language we have already shown by a reference to the case of Johnson v. Commonwealth, 7 Dana, 338. (Farmers Bank of Kentucky v. Commonwealth, 6 Bush, 127; Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382; Covington National Bank v. Covington, 21 F. R. 487; City National Bank v. Paducah, 10 Ky. L. R. 221.)

A somewhat detailed review of these cases seems to be necessary in view of the decision of the Supreme Court of the United States so much relied on by the other side. (Shelby County v. Union Bank, 161 U. S. 149.) We quote the first clause in the syllabus of that case:

> "A clause in the charter by a State of a banking corporation requiring it to 'pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes,' while it limits the amount of tax on each share of stock in the hands of the shareholders, does not apply to or cover the case of the capital stock of the corporation or its surplus, and accumulated profits, but such capital stock, surplus and accumulated profits are liable to be taxed as the State may determine."

We also quote the following sentence from the opinion (page 151):

> "In such a case as this, where we are to construe the meaning of the clause of the statute so as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the pre-

> vious decisions of the State courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves, independently of the decisions of the State courts, whether there is a contract and whether its obligation is impaired."

In a former part of this brief we have quoted extensively from the case of Johnson v. Commonwealth, 7 Dana, 338. This case, we repeat, was decided in 1838, and held that under the language of the fifteenth section of the charter of the Northern Bank the payment by the bank of the fifty cents a share was in full of all tax, not only against the bank, but also against the shareholder. Since then—a period of almost sixty years—so far as we know, no effort has been made to disturb this decision, and the tax paid by the bank has been taken as in full of all tax.

An effort has been made from time to time to lay additional taxes upon the bank. We have called attention to such an effort, involving the real estate of the bank, dealt with in Farmers Bank of Kentucky v. Commonwealth, 6 Bush, 127, the opinion in which was delivered in the year 1869, and from which we have heretofore quoted quite extensively.

In Covington National Bank v. City of Covington, 21 Fed. Rep. 485, decided in 1884, Mr. Justice Matthews delivered the opinion of the court. That was an effort by the city of Covington to tax the real estate and surplus of certain national banks located in that city. The opinion resulted in a judgment enjoining the city of Covington and its tax collector from any effort to collect these taxes. In the course of the opinion Mr. Justice Matthews said:

> "It also appears that nearly all the banks of this State are specifically taxed upon their stock at fifty cents upon each share of one hundred dollars; and that in the charters of most of them this tax is declared to be in lieu of all other taxes. And in construing and applying a provision to this effect in the charter of the Farmers Bank of Kentucky, the Court of Appeals of the State, in Farmers Bank v. Commonwealth, etc., 6 Bush, 127, said: 'By a compli-

ance with the section last quoted, the bank was to be discharged from the payment of all and any every other tax. From the amplitude of the language no other rational construction can be given to it.' It was accordingly decided in the case that the bank was not liable to be assessed for taxation for State or county purposes upon real estate taken by it or purchased by it in satisfaction of a debt, because 'it represents the assets of the bank to its value, and is no more subject to taxation than the notes or bills held by the bank, or the money in its vaults.' This seems to be the established and accepted law of the State."

The matter was very fully and carefully considered in Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382, decided in the year 1888. We make a very full extract from that opinion upon this subject:

"Does the provision in the appellee's charter and amendments, declaring that the payment of fifty cents on each one hundred dollars of its capital stock 'shall be in full of all tax or bonus,' exempt the appellee from the payment of county or city taxes? The appellant contends that it does not.

"It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank, and the means of conducting its operations. The bank can not increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee: first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations, for the benefit of its stockholders. The shares of the capital stock are represented by certificates. Each holder is a beneficiary to the extent of his ownership. But he can not control or withdraw a dollar of the principal; that must remain as the basis of the appellee's business operations. The shareholder is entitled only to share in the profits. So, the capital stock and the shares of the capital stock are distinct things, and both may be taxed. So, also, the franchise, the right of the bank to exercise its powers in the prosecution of its business as a

distinct right from its capital stock, may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, only its earnings, which are not a part of its capital stock, may be taxed. (Angell and Ames on Corporations, Section 556, 557; Bradley v. The People, 4 Wall. 459; National Bank v. Commonwealth, 9 Wall. 353.)

"If, when the State granted to the appellee its charter, she had been silent as to her right to tax it, she would have the absolute right to tax it, under the foregoing heads, without being amenable to the objection of being guilty of imposing double taxation. Nor could it be successfully maintained that the appellee would not be liable to be taxed by the appellant, the county court, under the Act of the 17th of March, 1876, and by the appellant, the city of Frankfort, under its charter. But the State did not choose to be silent. It did speak. It said that, in consideration of the appellee paying into the treasury fifty cents on each one hundred dollars of its capital stock paid in, without reference to its real value, such payment should be 'in full of all tax or bonus.' To say that this language has reference to the capital stock of the appellee, and not to the shares of its stockholders, or *vice versa*, or that it has no reference to the real estate of the appellee, acquired and used in its legitimate business, would be to torture the meaning of language. The State agrees that, in consideration of receiving fifty cents on each one hundred dollars of the appellee's capital stock paid in, the same shall be in full of all tax or bonus. It is conceded that this language binds the State to make no other assessment. And well may the concession be made; because, regarding the fifty cents in the light of a payment on the stock as capital stock proper, or as the stockholders' shares, yet the contract says that the payment 'shall be in full of all tax or bonus.' Also, regarding the appellee's real estate as a separate subject of taxation (and so is the capital stock on the shares), yet the contract says that the payment of the fifty cents shall be in full of all taxation. If any part of the appellee's property, its franchise, its capital stock, or the shares of its capital stock, or its real property used in the operation of its business, is to be taxed in addition to the fifty cents, then it can not be truthfully said that the payment of the fifty cents is 'in full of all tax or bonus.' As before said, it is conceded that the terms of the contract bar the State from imposing any additional taxation. But it is

contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they can not levy and collect taxes without the authority of the State conferring that right upon them. So the absurdity is presented that the State contracts with the appellee in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of 'all tax or bonus' —this is the meaning of the language—and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee, but may, notwithstanding, authorize all of its subdivisions, if the appellee's property and business were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract. 'Under such a contract between individuals a doubt could not exist.' The State, when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing."

In City National Bank of Paducah v. City of Paducah, 10 Ky. Law Rep. 221, decided June 9, 1888, it was held that the City of Paducah could not tax the banking house of a national bank. This was put distinctly upon the ground that the case from which we have just made the extract had held that such taxation could not be imposed on the State banks, and, therefore, under the authority of Covington City National Bank v. City of Covington, could not be imposed upon national banks.

The prevailing opinion of the Court of Appeals in the cases reported in 97 Ky. 591, simply assumed that the old banks had, at the time the Hewitt law was passed, the rights above indicated as belonging to them. The recent opinion delivered March 24, 1897, Deposit Bank v. Daviess County, 39 Southwestern, 1031, does indeed overrule the case of Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 370; but aside from the fact this was a pure dictum, as no banks whose charters were granted

prior to 1856 were involved in these new cases, the court, in overruling Judge Bennett's opinion, does so, not upon the ground that he has mistaken the scope and extent of the contract made by the old banks in regard to taxation, but that by reason of the fact that the charters had been extended since 1856 they had come within the purview of the act of that year.

We therefore submit that it is quite clear from this review of the cases in Kentucky, extending from 1838 to 1897, no case can be found in which the contracts made by the old banks have been construed in any other way than as a commuting of taxes payable by the banks, upon their capital stock, surplus, or other property, as well as the liability of the shareholder, to a payment of a fixed sum calculated according, not to the value, but to the number of shares, and payable by the banks to the State, and thereby excluding not only all further taxation by the State, but any taxation by the local municipalities.

We respectfully submit that this establishes, as clearly and as strongly as one can well conceive, that rule of property which the courts will not disturb after so long a period of reliance upon it and acquiescence in it.

Effect of Extending Charters.

The next question that we are here met with arises from the fact that the Bank of Kentucky has had its charter extended since the passage of what is known in Kentucky as the act of 1856. This act provides as follows:

> "Section 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.
>
> "Section 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

As we have set out in our statement, the Bank of Kentucky was originally chartered February 22, 1834, and it was provided that it should continue a body politic and corporate until October 1, 1864.

By an act approved February 15, 1858, its charter was extended as therein set out. We give the act in full in the appendix.

The charter of the Bank of Kentucky was further extended by an act approved February 1, 1872. We give it in full in the appendix.

The important question arises as to what is the effect of the Act of 1856 upon the right of the legislature to repeal or alter any clause (especially the taxing clause) in the original charter, growing out of the circumstance that the life of the charter has been extended twice by acts passed since the passage of the Act of 1856.

This question also was before the Court of Appeals of Kentucky in the case of Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 387, and was very fully considered and distinctly passed upon. On this subject the court said:

> "The appellant's next contention is that if the appellee's charter exempted it from all taxation, except that therein provided for, the same expired on the 1st day of October, 1864, and the Act of the 15th of February, 1858, extending the charter for twenty years, created a new corporation, which the legislature, under the Act of February 14th, 1856, reserved the right to amend at pleasure; and that the Act of the 17th of February, 1876, authorizing counties that levied and collected *ad valorem* taxes to assess banks and other corporations within said counties, operated as a valid amendment of the appellee's charter, to the extent of authorizing the collection of said taxes. . . . There is a broad distinction between the extension of a charter and the grant of a new one. An act which continues the life of a charter to a period beyond the time fixed in the charter for its expiration, and reserves the corporate organization, privileges, powers, duties, and rights, is an extension of the charter. Thus extended it is the same charter, with a con-

tinued lease of life under which the organization must be kept up; to which the company must look for its powers, privileges, and rights; by which it is to be governed and controlled. The act of extension relates back to the date of the charter. The legislature and the company are presumed to have contracted for the extension with reference to that period of time, when the respective rights of the contracting parties were agreed on; which agreement, in consideration of the continuous discharge of the obligations therein expressed, is to be continued beyond the time first agreed on. (Angell and Ames on Corporations, Section 780; People v. Marshall, 1 Gilman, Ill. Rep. 672; Exeter Bank v. Rogers, &c., 7 N. H. 32; Kennebec Bank v. Richardson, 1 Greenleaf, 72.)

"Here the legislature, by the Act of 15th of February, 1858, continued the chartered privileges and rights of the appellee twenty years from the 1st day of October, 1864. This extension did not have the effect of creating a new charter, but merely extended the life of the one which was already in existence. Therefore the Act of the 14th of February, 1856, does not apply; for the third section expressly provides that the act shall only apply to 'charters and acts of incorporations to be granted' thereafter.

"Conceding, however, that the Act of 15th of February 1858, creates a new charter, was it not the intention of the legislature, 'plainly expressed,' not in so many words, it is true, that the first section of the act of 1856 should not apply to it? Let us see. The act of 1858, as an additional consideration for the extension, provides that the appellee should establish a branch at Columbus, Kentucky; that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share on its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions, and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension. In addition to this, the Act of the 1st of March, 1872, authorized the appellee to purchase the stock that the State held in its bank; upon which it was to pay annually fifty cents on each one hundred dollars, which was to 'be in full of all tax or bonus' on such increased stock; also, her charter was 'extended twenty-five years.' That the appellee, in addition to its former obligation, agreed to pay annually fifty cents on each one hundred dollars of its

> contingent fund and increased capital stock, for the period of twenty-five years; that it was to be exempt from all other taxation thereon during that period; that it was to establish another branch at Columbus, Kentucky; that it was to restrict its circulation; that its business involved a large capital, the profits of which were limited to six per cent interest; that well defined and permanent rules were essential to its successful management; that changes in its chartered privileges might hazard its success and safety, and render uncertain and precarious a business whose success depended upon a steady adherence on the part of the State to its plighted faith. These considerations induce the belief that the Acts of 1858 and 1872 were intended to continue in force an irrevocable contract."

It will be observed that Judge Bennett considers the application of the Act of 1856 from two standpoints: first, he considers the question as to whether it is applicable at all; second, he considers the question as to whether these acts do not express the contrary intent, so as to exclude them from the operation of the Act of 1856. It is for this reason that we have quoted these acts in full, so that the court might examine them in connection with the Act of 1856, and determine from an inspection of them whether they are in any respect within the terms of that act, and whether they are not so drawn as to exhibit the intention of the legislature not to apply the Act of 1856 to them.

In National Exchange Bank v. Gay, 57 Connecticut, 224 (same case, 17 Atlantic, 555), the question arose, What was the effect upon the continuing contracts of a corporation of an act extending the existence of a corporation? The court said:

> "The power which created the plaintiff put a limit to its existence. Before that limit had been reached, while the plaintiff was in full corporate life, the creating power moved that limit further into the future. The power which can create can prolong. It was not the substitution of one legal entity for another; it was not the changing of a State into a national corporation; it was not even the restoration of a spent corporate life. The identical corporation which received the breath of life in 1863 has been in uninterrupted, unchanged existence to this present, having the same rights, bearing the same obligation."

So, in the case at bar, this is the same bank which was created in 1834. The extension of the charters has merely extended the existence of the corporate life. It has not either added to nor taken away from the powers, franchises, or privileges of the corporation.

Undoubtedly there is a distinction between the right to be a corporation and the powers and privileges vested in the corporation. The franchise to be a corporation belongs not to the corporation, but to the incorporators. The franchise to do, to act, to exercise privileges and franchises, to enjoy whatever grants may be made by legislatures or individuals, belongs to the corporation. This distinction is brought out in the case of Fietsam v. Hay, 122 Ill. 293 (S. C., 3 Am. State Rep. 494). We quote:

> "Now it is clear from these definitions, and from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation, and not in the corporation itself. This fact, we think, is not without significance in reaching a conclusion upon the main question to be determined, outside of the numerous authorities bearing directly on the subject. It will be kept in mind that the corporate body, for purposes of ownership, and indeed for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell, or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the State. All these propositions are familiar to the courts and the profession, and are well sustained by authority. If, then, the franchise is vested in and belongs to the corporators, and not to the corporation itself, how could the latter transfer or assign it to another? On the plainest of principles this could not be done without legislative authority for that purpose, and we

> find nothing, either in the statute or the company's charter, conferring such authority. While it is conceded the legislature might confer on the artificial body the power to sell or assign the franchise to strangers, yet this would be in effect to authorize it to commit a species of suicide, for it is manifest the corporation could not exist a moment after the franchise conferred upon its members had been transferred to others."

The Supreme Court of the United States, in Memphis Railroad Company v. Commissioners, 112 U. S. 619, makes the same distinction. It is there stated:

> "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the corporation. The latter has no power to dispose of the franchise of its members which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises."

Under the act of 1856 the right is reserved to the legislature to amend or repeal all charters or grants of or to corporations, or amendments thereof, unless a contrary intent be therein plainly expressed. But here is no grant to a corporation nor any amendment of any grant to a corporation. Here is simply the prolongation of the right in the corporators to continue to be a corporation. It is not worth while to consider, if every thing else was out of the way, what right the legislature might have to limit the existence of these corporations; to take away from the corporators the right to longer act as a corporation. We think we could show that such a right could not be exercised by the legislature. All that we have now to consider is the question as to whether the contract made between the State and the bank in 1834, when its charter was granted, is now subject to modification or repeal, simply because since then the legislature has lengthened the term of the franchise vested in the corporators to be a corporation.

It has never been claimed that where a corporation was created prior to 1856, the mere fact that it accepted an amendment passed subsequent to 1856 makes its charter or any part of it subject to amendment by the legislature. The only reservation made by the Act of 1856 is as to grants or charters or amendments passed after 1856.

It appearing, therefore, that the contract which is here being insisted upon is a franchise or privilege of the corporation, and that the amendment made since 1856 is simply a lengthening of the franchise to be a corporation, which belongs to the corporators, it would seem that, taking the terms of the Act of 1856, and its intendment, in the broadest way, it can not include such a case as that which we now have at the bar.

At the same time that the case now under argument was heard by the learned Circuit Court it also had under consideration a similar bill filed by the Northern Bank of Kentucky against the Board of Valuation and Assessment. In that case the Court found no presumption from the thing adjudged, and therefore examined the question as to whether the Northern Bank had an irrepealable contract with the State under the Hewitt law.

This bank was also chartered prior to the year 1856, and had its charter life extended by two acts passed since 1856. These acts are so similar to the one extending the charter life of the Bank of Kentucky that we do not contend that we can distinguish them.

The learned Circuit Court held that the act of 1856 applied to the tax provision in the charter of the Northern Bank, also similar to that of the Bank of Kentucky, and that when it surrendered that provision by making its contract under the Hewitt law it simply surrendered that which the legislature might at its pleasure have taken away.

The learned Court disregarded the opinion of the Court of Appeals in the case of Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382, and held that as the case of Deposit

Bank of Owensboro v. Daviess County, 39 Southwestern Reporter 1030, overruled the former case, the matter was at large, and the Circuit Court had the duty of considering the question as an original one.

So considering it, it held against the contention of the Northern Bank.

What we have said above has been in answer to the argument contained in this opinion in the Northern Bank case, which is reported, Northern Bank of Kentucky v. Samuel H. Stone, &c., 88 F. R. 413.

The Franklin County case was certainly thoroughly considered by the Court of Appeals of Kentucky. The effect of the extension of these old charters was one of the main points under advisement, for unless these extensions continued the protection of the banks, notwithstanding the act of 1856, the judgment of the Court must have been the other way.

The banks under special consideration in the opinion of Judge Bennett were those chartered prior to 1856, particularly the present appellee, the Bank of Kentucky. In the later case the opinion of a bare majority overrules this opinion in a sentence, and that, too, in cases of banks chartered since the year 1856. Notwithstanding what is said in the opinion in the case of Northern Bank v. Stone, 88 F. R. 413, we fail to perceive how the question of what should be considered the legal effect of extending a charter granted prior to 1856 could have upon a consideration of the rights of a bank whose charter was granted since 1856, and with due deference we still submit that what is said on this subject in the later case is pure dictum.

Judge Bennett's opinion, delivered in 1888, is a careful consideration of the effect of the act of 1856 in a case where that was the very question involved. And aside from its argument, which we have given above, it seems to us that great weight is due to it as a decision that stood unchallenged for almost ten years, and upon the faith of which millions of property represented by the stock of these old banks has been dealt with upon the market.

We submit, therefore, that the court will follow the earlier rather than the later decision, and hold that when the Hewitt law was passed in 1886 this bank had a clear contract right under which it was to be taxed fifty cents a share, in lieu of all other taxation—State, county, or municipal.

The Contracts Under the Hewitt Act.

What change was then made? In a previous part of this brief we have stated the Hewitt law, and printed it *in extenso* in the appendix. We have stated that the Bank of Kentucky accepted it in accordance with its terms, and according to the manner pointed out. What the bank did was to give its consent to the levying of that tax; to agree to pay the same as therein provided, and to "waive and release all rights under the charters of the State banks *to a different mode or smaller rate of taxation.*"

This consent and agreement to and with the State of Kentucky was to be and was evidenced by writing under the seal of the bank, and delivered to the Governor of the Commonwealth, and the law provided that upon such agreement and consent being delivered, and in consideration thereof, the bank and its shares of stock should be exempt from all other taxation whatsoever, so long as said tax should be paid during the corporate existence of such bank.

The act further provided, in Section 6, as follows:

> "This act shall be subject to the provisions of Section 8, Chapter 68, General Statutes."

Section 8, Chapter 68, General Statutes, is the modern form of the Act of 1856:

> "All charters and grants of or to corporations, or amendments therof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

What effect did this contract have upon the respective rights of the banks and the State? All that the banks purported to do was to agree to pay the rate of taxation prescribed by the Hewitt law, and to waive and release all rights under their charters "to a different mode or smaller rate of taxation." The agreement did not entirely release the contract between the State and the banks as embodied in their charters. It was not asked to be nor intended to be an absolute dissolution of contractual relations, but, upon the one side, an agreement upon the part of the bank to pay this new rate of taxation; to release its right to a "different mode" or "smaller rate of taxation"; and, upon the other side, an agreement that the bank and its shares of stock should be exempt from all other taxation whatsoever, so long as the new tax was paid during the corporate existence of the bank.

A most instructive case upon this subject is that of State v. Commissioner of Railroad Taxation, 37 N. J. Law, 241. This case must be read in connection with that of State v. Commissioner of Railroad Taxation, 37 N. J. Law, 229. Reading these two cases together, it appears that there were certain railroads in New Jersey which had irrepealable contracts with the State on the subject of taxation, and certain others which had contracts subject to repeal. The legislature passed a law for the taxation of railroad corporations, providing, in certain sections, for those which had repealable contracts, and in certain other sections for those which had irrepealable contracts. Among the latter was the United Railroad and Canal Company. This Company was taxable in a certain way upon its stock, and in a certain other way upon its passengers and freight. In the year 1846 the legislature passed a law providing for a different method of taxation upon the passengers. This act, as was declared by its terms, was not to go into effect until the acceptance of its provisions by the company as part of its charter should be certified; and "the power of the legislature to alter, modify, or repeal *this* act whenever in their opinion the public good requires it, was expressly reserved."

In regard to this part of the case the learned court said:

> "This act simply modified the 18th section of the company's charter in one particular—with respect to the transit duty on passengers, leaving the provisions of that section as to tax on capital stock and transit duty on merchandise, and the exemption from general taxation, unaffected; and the power of alteration and repeal is expressly limited to alteration or repeal of the provisions of this new act. If that power should be exercised the effect should be merely to recall the privileges therein conferred, and remit the company to its rights under its original charter."

Another act was passed in 1869, by which provision was made for superseding special contracts with corporations paying transit duties whose charters were irrepealable, by substituting another mode of taxation, by mutual consent (page 247). This act was accepted by the United Railroad and Canal Company. As to the effect of its acceptance, the court said:

> "Upon the acceptance by the prosecutors (Railroad Company) of the provisions of this act, their former contracts on that subject were superseded, and a new contract embodying the provisions of this act became the contract between them and the State."

Again, the court said:

> "But the chief argument on this part of the case, in support of this assessment, was that contracts which oust the State of the sovereign power of taxation were to be strictly construed, and that when once departed from by the consent of the privileged party, they ceased to have any binding force. This argument was applied not only to the Act of 1869, but more especially to the prior Acts of 1846 and 1864 in relation to the New Jersey Railroad Company. The first of these propositions is conceded, but the existence of a contract of this nature with these prosecutors, in their original acts of incorporation, is too firmly established to be a debatable question (citing authorities). If by the second of these propositions be meant that an exemption from general taxation once surrendered can not be resumed, it is also conceded. But if it be meant that a corporation having

such exemption by an irrepealable charter can not contract with the State for a modification of the special taxation therein imposed, and yield part and accept other terms in lieu thereof without surrendering the whole, the argument is without legal foundation.

"A contract with a corporation once made is the same as a contract with an individual. Both are equally within the protection of the constitutional provision. Neither can be impaired except by compact and agreement of the parties, founded on a sufficient consideration, and the original obligation remains intact, except so far as altered by mutual consent.

"The contract, the prosecutors rely on in an agreement on their part to pay a per cent on capital stock, together with certain transit duties, and an agreement on the part of the State that no other tax or impost shall be levied or assessed upon them; in other words, that they should not be subject to general taxation in any form at the will of the legislature. Corporations having contracts of this character with the State may consent to other taxation, or to a different mode of assessment from that specified in their charters, by the acceptance of subsequent legislalative acts, without imparing the general exemption in their charters. In such event the new taxation or new mode of assessment becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force."

This case is in its facts and its reasoning so apposite to the case at bar that we submit it should be controlling. Admitting to the farthest the claim that the State had the right to repeal the Hewitt law, and retire from the contract made thereunder, the only result would be that the banks would be remitted to their former charter rights. Admitting that the banks, by coming under the Hewitt law, have consented to pay the rate of taxation therein prescribed, this does not abrogate all contractual relations between the banks and the State, but simply substitutes the new contract for the old contract. Admitting that the banks can no longer pay fifty cents a share in full of all tax or bonus, yet the State can not exact any thing beyond this except to the extent prescribed by the Hewitt act.

Therefore, the State can, if the argument upon the other side is sound, have no greater right than that of retiring from the contract made in the Hewitt law; and the result follows that there immediately revive to the banks their rights to their old contract.

This is further illustrated by the opinion of this court in Louisville Water Company v. Clark, 143 U. S. 16. That was a case where, in consideration of the Water Company waiving all right to charge for water furnished to the city for public fire cisterns, fire plugs, or hydrants, the Water Company was to be exempt from taxation.

This court held that as this amendment to the charter of the Water Company was made subsequent to the Act of 1856, it was subject to legislative repeal; but the court said that the obligation to remit the charge for these services remained only so long as the exemption continued in force; and the court proceeded thus:

> "This view is in harmony with the Act of 1856, which expressly declares that while privileges and franchises granted to corporations after its passage could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the Act of 1882, in respect to its right to charge for water furnished for public fire cisterns, fire plugs, or hydrants."

It does not seem to us necessary to extend this brief so as to consider the question so ably debated in the opinion of Chief Justice Pryor in the Bank Cases, 97 Ky. 599, that under the authority of New Jersey v. Yard, 95 U. S. 110, the Hewitt law can not be construed as authorizing the State to withdraw from a contract made with the solemnity and the form with which contracts under the Hewitt law were clothed, and that the right reserved in the Hewitt law to repeal its provisions could not apply to contracts made prior to a repealing statute. These questions will be considered in the brief and argument of

counsel having cases for banks whose charters were granted since 1856, and here on writ of error to Court of Appeals of Kentucky.

We believe that we have shown that as to the bank whose rights are being considered in this argument, one result or the other must follow—either that the Commonwealth of Kentucky can not retire from the contract made in the Hewitt law at all, or if it does so, the bank is remitted to its original charter rights, and in no event and by no construction can its release of such charter rights be made broader than the terms of the Hewitt law, by which it was confined simply to a release from a right to a different mode or smaller rate of taxation than is fixed by that revenue system.

Therefore this bank has, ever since the Hewitt law was passed, and notwithstanding any effort upon the part of the State, by the Constitution of 1891, or the revenue law of 1892, to retire from it, consistently performed its duties under it, without endeavoring to claim the right to fall back upon the smaller rate of taxation fixed by the original contract.

The Effect of Former Judgments.

The next proposition is that the questions at issue here between the complainant and defendants are *res adjudicata*. We hope to be able to show that in proceedings regularly instituted and conducted, and wherein the Bank and the appellants assumed adversary positions, all of the vital questions now to be determined by the court have been set at rest by judgments duly entered.

Suits Involving Bank of Kentucky.

The suits in which the Bank of Kentucky has been heretofore engaged as a litigant are five in number, and the records and full proceedings in each of these cases were filed as exhibits with its bills of complaint. We will state them in their chronological order:

BANK OF KENTUCKY v. CITY OF FRANKFORT, 1882–1888.

On November 21, 1882 (No. 356, R. 29), the Bank of Kentucky filed its petition in the Franklin Circuit Court against the city of Frankfort, alleging that the municipality was endeavoring to levy a tax on the real estate of the bank situated within the city limits. The petition shows that this real estate consisted of two parcels: one, the banking house, and the other, certain real estate purchased for debt. The petition alleges the incorporation of the bank, the various statutes extending its corporate life, the contract contained in the fifteenth section of its charter in regard to taxation, and its full compliance with that contract, and insists that the effort upon the part of the city of Frankfort to collect taxes upon the real estate is illegal, and any authority which had been given to it by the State so to do is in violation of the contract between the State and the plaintiff. To this petition the city of Frankfort filed an answer (No. 356, R. 34-35), claiming the right to collect the tax in question under an act passed to reduce into one the several laws in relation to the city of Frankfort, and which was approved March 16, 1869. (2 Acts 1869, 485.) By Section 13 of that act it was provided as follows:

> "That the Board of Councilmen shall have power and authority to assess annually, levy and collect a tax not exceeding two dollars and fifty cents on the hundred dollars' worth of property, exclusive of the school tax and tax authorized to pay principal and interest of the bonds of the city issued for school purposes, on all real estate within the limits of said city."

This cause having been regularly submitted, resulted in a judgment in favor of the Bank of Kentucky, entered May 17, 1884, enjoining and restraining the defendants "from selling the property mentioned and described in the petition, or any part thereof, for delinquent taxes claimed to be due by the plaintiff to the Board of Councilmen of the city of Frankfort." (No. 356, R.

36.) From this judgment the city of Frankfort took an appeal to the Court of Appeals of Kentucky, and in that court this judgment was in 1888 affirmed, the opinion being one of those reported under the style of "Franklin County Court v. Deposit Bank of Frankfort," 87 Ky. 375.

BANK OF KENTUCKY V. FRANKLIN CO., 1883–1888.

On September 6, 1883 (No. 356, R. 16), the Bank of Kentucky filed a suit in the Franklin Circuit Court against the Sheriff of Franklin County and the Franklin County Court. (The latter is the fiscal authority of the county.) In this petition it was alleged that the county court had made an assessment of the personal estate of the plaintiff for each of a number of years stated in the petition, and that this assessment was being attempted to be enforced, and taxes collected upon its basis. This petition also sets out the organization of the bank, its contract under the fifteenth section of its original charter, the acts extending its existence, and claims that any authority alleged to exist in the county to make the assessment is invalid as violative of the obligation of the plaintiff's contract with the State. The act under which the county claimed to make this assessment is one entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court," and was approved March 17, 1876. (1 Acts 1876, 78.) The second and third sections of that act are as follows:

> "Sec. 2. That it shall be the duty of the chief officer or agent of any railroad company, bank, mining or manufacturing company, toll-bridge or turnpike road company, any gas or water company or association, or any other incorporated person or persons or company doing business or owning property in said county, residing in said county, to list or cause to be listed with the assessor of said county all the property of said railroad, bank, mining, manufacturing, toll-bridge, turnpike road, gas or water company, or other incorporated person or company situate in said county; but if they fail or refuse to do so upon demand made upon them

by the assessor, then the assessor shall list the same and shall add twenty-five per centum to the value as a penalty for such refusal; but if no officer or agent of any of said companies reside in said county, then the assessor shall ascertain the value of said property and list the same.

"Sec. 3. That all the property thus listed and assessed shall be subjected to an equal and uniform rate of tax."

The defendants demurred to the petition (No. 356, R. 26), and this demurrer was overruled, and the defendants declining to plead further, judgment went in favor of the Bank of Kentucky on May 17, 1884, by which it was adjudged that "the defendants are perpetually enjoined and restrained from further proceeding to collect the taxes mentioned in the action." (No. 356, R. 26.) From this judgment the defendants prayed and prosecuted an appeal to the Court of Appeals, where it was affirmed. The opinion delivered by the Court of Appeals is reported under the style of "Franklin County Court v. Deposit Bank of Frankfort," 87 Ky. 375.

An examination of the record in these two cases will disclose the fact, which we hardly believe will be controverted, that the sole ground upon which the litigation proceeded was the claim by the Bank of Kentucky upon the one side, and the denial by the city and county upon the other, of the existence and irrevocable nature and extent of the contract contained in Section 15 of the charter of the Bank of Kentucky.

BANK OF KENTUCKY v. FRANKLIN CO., 1893–1895.

As we have stated in a former part of this brief, in the year 1891 a new Constitution was adopted in Kentucky. This Constitution provided what property should be exempt from taxation by Section 170, and then, by Section 172, provided as follows:

"All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale."

As heretofore stated, the legislature passed a general revenue law, which took effect November 11, 1892. As applicable to banks this law provided for a report by them to the Auditor, and a valuation of their assets by a board composed of the Auditor, Secretary of State, and Treasurer. Upon the basis of this valuation the bank was required to pay to the State Auditor the current rate of State taxation, and the board was required to certify to the various municipalities where the bank exercised its franchise to the proper proportion of the total value found by the board, used in each of these localities. Following out the terms of this law, the board certified to the city of Frankfort, and to the county of Franklin, that there was $195,000 of value belonging to the Bank of Kentucky subject to be taxed by the city of Frankfort and by the county of Franklin. Under these circumstances, the county authorities being about to enforce the payment of a tax upon this basis of valuation, the Bank of Kentucky filed in the Franklin Circuit Court on December 22, 1893, its petition against the sheriff of the county and the Franklin County Court (the fiscal authority of the county). (No. 356, R. 40.) In this pleading it set out its original organization, its contract in reference to taxation with the State contained in Section 15 of its charter, the laws extending its corporate existence, the passage of the Hewitt law in 1886, its agreement with the State based upon that law, its full compliance with the provisions of its charter as to taxation down to the time of the passage of the Hewitt law, its full compliance with the Hewitt law since its passage, the passage by the legislature of the Act of November 11, 1892, the proceedings of the Board of Valuation and Assessment thereunder, and threatened effort by the defendants of the collection of a tax based thereon; and upon this statement of its case the bank alleged, with entire distinctness and with great fullness, its claim that it was protected from the scheme of taxation embodied in the Board of Valuation and Assessment law, and that the provisions therein were in violation of its contract with the State, and therefore null and void. To

this petition a demurrer was filed, and the demurrer was sustained, and the petition dismissed January 27, 1894. (No. 356, R. 40.) From this final judgment the bank took an appeal to the Court of Appeals. Its case is one of those decided on June 1, 1895, and reported under the style of "Commonwealth for use, &c., v. Farmers Bank of Kentucky, &c.," 97 Ky. 590. The Court of Appeals reversed the judgment of the Franklin Circuit Court, and sent down its mandate directing that a judgment should be entered in the Franklin Circuit Court in accordance with that mandate; and on January 21, 1896, the Franklin Circuit entered the following judgment, to wit (No. 356, R. 57):

> "This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the Court of Appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that Article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, Chapter 92, Article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than is prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of this State and the Act of November 11, 1892 (Article 3, Chapter 103, Acts 1891–2–3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void; that the Board of Valuation and Assessment provided for in said Act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the

same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants, Franklin County, and R. D. Armstrong, sheriff of said county, be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin County upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its cost in this action expended."

BANK OF KENTUCKY V. CITY OF FRANKFORT, 1894–1895.

On the 6th of September, 1894, the Bank of Kentucky filed a suit in the Franklin Circuit Court against the city of Frankfort and its tax collector. (No. 356, R. 58.) In that petition allegations were made in all respects similar to those which we have described above as made in the suit against Franklin County. It was alleged that Franklin County was not only attempting to collect taxes under a return made by the Board of Valuation and Assessment for the years 1893 and 1894, but that it was attempting to collect city taxes upon all of the real and personal property of the Bank of Kentucky for the year 1892, under the assumption that the Constitution by its own force had repealed the Hewitt law. The existence of the bank and its contracted rights were fully set up in this petition and entirely relied on. On September 25, 1894, the court decided the case, holding that the city of Frankfort could not collect the tax for 1892, because it required legislative action to carry into effect the provisions of the Constitution in regard to taxation; but that it could collect the tax for 1893 and 1894 upon the valuation certified by the Board of Valuation and Assessment; and thereupon dismissed the petition of the Bank of Kentucky as to these two years' taxes. (No. 356, R. 72.) From this judgment the Bank of Kentucky appealed to the Court of Appeals, where this judgment was reversed, the opinion in this case being

delivered at the same time as the opinion in the Franklin County case above mentioned. A mandate from the Court of Appeals went down in accordance with its order of reversal, and thereupon a judgment was entered in the Franklin Circuit Court which is in all respects similar to the judgment entered in the case of the Franklin County Court above recited. (No. 356, R. 76.) It may be well to state here that the opinion of the learned Circuit Judge of Franklin County in these two cases was to the effect that the Bank of Kentucky had absolutely released its contract under its charter by its proceedings under the Hewitt law, and that it had further agreed that the Hewitt law might, whenever the State chose so to do, be repealed, and the bank remitted not to its original rights, but to be considered as having no contract whatever. (No. 356, R. 50.)

BANK OF KENTUCKY v. CITY OF LOUISVILLE, 1894–1895.

Following the adoption of the Constitution and of the law applicable to cities of the first class, the city of Louisville, on the 29th of January, 1894, passed an ordinance requiring all banks located within its limits to pay, as a license fee, four per cent of the gross earnings, the payment to be made to the commissioners of the sinking fund, and the ordinance providing a penalty for failure to make such payment. By Section 2922, which is one of the sections applicable to cities of the first class, the legality of an ordinance can under certain circumstances be tested by one who is being prosecuted under it by a writ of prohibition in the Jefferson Circuit Court. An attempt having been made to proceed against the Bank of Kentucky in the City Court, and to subject it to the penalty denounced by this ordinance, the bank, on May 4, 1894, filed its petition in the Jefferson Circuit Court and asked a writ of prohibition against the Hon. R. H. Thompson, Judge of the City Court of Louisville (No. 356, R. 78). This petition sets out the history of the organization of the bank, its contract under Section 15 of

its charter, its compliance therewith down to the time of the passage of the Hewitt law, its compliance with the Hewitt law, and payment of taxes thereunder; makes claim that the ordinance passed by the city of Louisville is violative of its contract rights, and asks that further proceedings under it be prohibited. To this petition there was a demurrer, and the demurrer being overruled, judgment was entered accordingly in favor of the bank, holding the ordinance invalid, and prohibiting any further proceedings upon the warrant against the Bank of Kentucky for violation thereof. (For opinion of Circuit Judge Field, No. 356, R. 85.) (For Judgment, No. 356, R. 88.) From this judgment the defendant Thompson and the city of Louisville appealed to the Court of Appeals, where it was affirmed, this also being one of the cases decided and reported as above.

It will thus be seen that prior to the passage of the Hewitt law, in a direct contest with the city of Frankfort and the county of Franklin, it had been determined that the charter provision of the Bank of Kentucky in regard to taxation was inviolable and beyond the power of the legislature to change or limit. It will be further seen that after the passage of the Hewitt law and the adoption of the new Constitution, and the new system of taxation under it, it was determined in one case where the Bank of Kentucky was complainant and the county of Franklin defendant; in another case where the Bank of Kentucky was plaintiff and the city of Frankfort defendant; and in the third case where the Bank of Kentucky was plaintiff and the city of Louisville (or what is equivalent, the judge of the City Court) was defendant; that the contract made by the bank with the State under the terms of the Hewitt law was inviolable. The records in all of these cases are filed as exhibits in this cause, and it needs only an inspection of them to show that they are based upon the existence of these contracts and the claim upon the part of the Bank of Kentucky that they are inviolable. We have above adverted to the fact shown by the record that it was the city of Louisville which prosecuted the appeal in the last case.

Indeed, the judgment of the Jefferson Circuit Court in these proceedings in prohibition was directly against the city of Louisville. We quote from it:

> "It is considered by the court that the prayer of the petition be granted and that the city of Louisville and R. H. Thompson, Judge of the Louisville City Court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, the Bank of Kentucky in the city of Louisville, or making any further order therein; and it is further considered that the plaintiff recover of the defendant, the city of Louisville, its costs herein expended, and may have execution therefor. To all of which defendants except and pray an appeal to the Court of Appeals, which is granted." (R. 88, 89, No. 356.)

While these various suits were going on, the Auditor declined to accept from the Bank of Kentucky or the other banks any thing more than the ordinary rate of taxation based upon the valuation of the State Board. After the suits had been decided in favor of the banks and the Court of Appeals had held that the Hewitt contract was still in force, the Auditor called upon and required the banks to pay to him the difference between what had already been paid to him and the amount due under the Hewitt law. This was for State taxation. The Bank of Kentucky and all the other banks without exception complied with this demand.

As above stated, the opinion of the Court of Appeals in the Bank of Kentucky case and the other cases heard with it was delivered in June, 1895, four judges holding that the contract under the Hewitt law was not repealable; three holding that it was repealable. In 1897 the same court, in other cases, decided that the contract under the Hewitt law was repealable, four judges so holding and three holding that it was not repealable. It was after this last decision that these suits were filed.

This statement of our case is regrettably long, but we have not seen where we could condense it except at the expense of clearness.

Upon this statement we submit that, under the conclusive presumption of the thing adjudged, the Bank of Kentucky has established its contract and the terms of it and its character as one not subject to be lessened or impaired by any constitution or law of the State of Kentucky.

This brings us directly to the discussion of

Authorities upon Res Adjudicata.

The authorities upon this subject are so numerous and full in the Federal Courts that we have not thought it necessary to go outside of them. In Tioga Railroad v. Blossburg Railroad, 20 Wallace, 142, it appears that the one railroad sued the other upon a contract of lease. There was a dispute as to the proper construction of this contract. The Supreme Court of New York, construing the contract, gave judgment according to that construction. A subsequent suit was brought for other sums due on the same contract, and again the question of its proper construction was raised. This time the suit was in the Circuit Court of the United States, and the plaintiff having again recovered judgment, the case was carried to the Supreme Court of the United States. Mr. Justice Bradley, delivering the opinion of the court, said:

> "Some attempt has been made to show that in the suit brought in January, 1855, in the Supreme Court of New York by the Blossburg Company against the Tioga Company, on the contract now in question, the matter of the difference for which the present suit is brought was not a question decided; but we have looked at the record and proceedings therein which were in evidence in this case, and are satisfied that it was decided. The report of the case in 1 Keyes, 486, shows that it was the only question before the Court of Appeals, to which court the case was carried. The point then is *res judicata* between the parties. It can not be litigated again on the same contract."

In Southern Minnesota Co. v. St. Paul Co., 55 Federal Reporter, 695, Judge Thayer delivering the opinion for the Circuit Court of Appeals for the eighth circuit, says:

> "The doctrine is well established that when an issue of fact, or a mixed question of law and fact, on which the decision of a case depends, has been tried and determined, the parties to such trial will be estopped, even in a second suit on a different cause of action, where the same issue or question arises, from contending to the contrary of what was thus found and determined. . . . The authorities furthermore show that the estoppel, arising from a finding in previous suit between the same parties, is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision construing an agreement between the parties, and to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

The leading case upon this subject, and one which is more cited than any other, is that of Cromwell v. County of Sac, 95 United States, 352. The Supreme Court, speaking through Mr. Justice Field, is there considering the difference between the plea of *res adjudicata* where the suit is between the same parties on the same cause of action and on a different cause of action. We make the following extract from the opinion:

> "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In Forsyth v. City of Hammond, 166 United States, 506, we find this state of case presented: An effort was made in the State Court of Indiana to annex certain territory to the town of Hammond. In the proceedings taken to effectuate this purpose, Forsyth appeared to resist, and a judgment having been rendered

annexing her land, she appealed to the Supreme Court of Indiana, where the judgment was affirmed. Pending her appeal, she filed a bill in the Circuit Court of the United States to enjoin the city of Hammond from annexing the territory. Judge Baker dismissed her bill. The Circuit Court of Appeals reversed this judgment, and directed that a decree be entered enjoining the annexation. A certiorari was taken to the Supreme Court of the United States, where Judge Baker's judgment was affirmed, and that of the Circuit Court of Appeals reversed. In passing upon the question of *res judicata*, Mr. Justice Brewer said:

> "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal acting independently and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

The same learned Justice also said in Last Chance Mining Co. v. Tyler Mining Co., 157 United States, 691:

> "It is said that the defendants did not contest; that they withdrew their answer, and that there was only a judgment by default; but a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.
>
> "The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached?"

These principles have been frequently applied by the Supreme Court and by the circuit courts and circuit courts of appeals of the United States. Thus in Lumber Co. v. Buchtel, 101 United States, 638, there was an action upon a guaranty which contracted for the payment of purchase money in instalments. To a suit for the first instalment, the defendant, the guarantor, pleaded that it was induced to make the contract of guaranty by fraud; nevertheless, judgment was recovered. To the second action it set up the same defense, and also that a representation was made to it which amounted to a warranty. The court held that as to the first defense there could be no doubt that the first judgment was conclusive. That as to the second, the same was true, because in looking into the record the court ascertained that the finding of the referee upon which the first judgment was rendered showed that no representation at all had been made by the plaintiff to the defendant, and this finding having gone into the judgment was conclusive as to the facts found in all subsequent controversies between the parties on the contract.

The case of Wilson's Exor. v. Deen, 121 United States, 529, presents the converse to this case, and again the former judgment is held binding.

The case of Nesbitt v. Riverside District, 144 United States, 619, presents the converse to the case of Cromwell v. County of Sac, and is decided by applying the same principle.

In Johnson Co. v. Wharton, 152 United States, 256, the court applied the same principles, although the judgment in the first case was for so small an amount that the Supreme Court had been without jurisdiction to hear it on writ of error. This circumstance was held to make no difference.

We might cite many other cases upon this general subject, but these are, we believe, sufficient to show that the court will look into the records we have here filed and ascertain for itself whether in fact the construction, the validity, and the sanctity of the contract between the Bank of Kentucky and the State have been litigated; that the court will look into the opinions delivered

by the Court of Appeals of Kentucky to see what was the real matter in issue, and so looking will ascertain that the Court of Appeals of Kentucky has held that the matter in issue in the cases decided in 1887, and reported in 87 Kentucky, and from which we have so extensively quoted, was as to the existence of the contract between the Bank of Kentucky and the State of Kentucky, as embodied in the fifteenth section of its charter; as to the meaning and extent of this contract as a protection to the bank against further taxation than that exacted by the terms of that section; and as to the inviolability of that contract during the continued existence of the bank under the statutes extending its charter life.

In like manner the court will, in looking into the records and the opinion of the Court of Appeals of Kentucky, delivered in June, 1895, and reported in 97 Kentucky, ascertain that the matter that was there in issue was the effect of the Hewitt law; of the compliance therewith by the Bank of Kentucky; of its scope and true meaning, and of the protection it afforded to banks involved in that litigation against the scheme of assessment and taxation provided under the new Constitution and the revenue law of November 11, 1892, or any other constitutional or statutory enactment which, during the charter life of these banks, should endeavor to impose a different mode or greater rate of taxation upon the litigating banks than was imposed by the terms of the contract made between the State and the banks under the authority of the Hewitt law.

We invite an examination into the pleadings of the Bank of Kentucky in these cases. In every instance its claim for relief is specifically based on its contracts just as embodied in its original charter, and then as prescribed by the Hewitt law.

Res Adjudicata as Applied to Tax Cases.

It now remains for us to consider some cases which have been decided upon the proper application of the doctrine of *res adjudicata* to a litigation in reference to taxation.

An examination of these will show that the principles to be applied here are exactly similar to those in other cases.

In City of Davenport v. Railroad Co., 38 Iowa, 633, it appears that there was a suit for taxes by the city against the railroad company. These were claimed on the depot grounds situated within the limits. The question seems to have turned upon the construction of an Iowa statute, whether the railroad, by paying a tax on its gross earnings, thereby relieved itself from the payment of city taxes on real estate situated within the corporate limits.

A railroad company, predecessor to the one sued, had enjoined the city from the collection of such taxes for several years. It was insisted that this was *res adjudicata*. The court held that this was not true, that each year's taxes was a separate cause of action, and that the decision in the former case was not binding in this case. Among other things the court said:

> "Again, this case does not fall within the principle involved, where a particular issue of fact is tried and determined and judgment rendered upon such determination, which judgment estops both parties afterwards from denying the fact thus found and determined."

Here the court itself distinguishes this case from such a one as is at bar, because in the various cases which have been heretofore decided there has certainly been a mixed issue of law and fact; the existence, construction, and validity of the contracts between the banks and the State.

The cases of Keokuk & Western Railroad Company v. Missouri, 152 U. S. 301; K. & W. R. R. Co. v. Scotland Co., 152 U. S. 317, and K. & W. R. R. Co. v. Scotland Co., 152 U. S. 318, present this question of *res adjudicata* in various phases.

It seems that the Alexandria & Nebraska Railroad Company was a Missouri corporation having a certain exemption from taxation. A Constitution was adopted in Missouri subsequent to the organization of this company, forbidding further exemption from taxation. After this time the Alexandria & Nebraska Railroad

Company consolidated with the Iowa Southern Company. The new company made a mortgage upon its line. This mortgage was foreclosed, and the property purchased by the K. & W. Railroad Company. The question was whether the exemption from taxation originally belonging to the Alexandria & Nebraska Railroad Company passed to the consolidated company and inhered in the property and could be taken advantage of by the successor, the Keokuk & Western Company. The court held that by the consolidation the exemption from taxation entirely ceased. It appeared that the county of Scotland had sued the consolidated company, the M. I. & N. R. R. Company, to recover the taxes for 1872 upon the property in question, and had been defeated, the court holding it to be exempt under Section 9 of the charter of the Alexandria & Nebraska Railroad Company. The Supreme Court held that this estoppel did not apply in the present action for various reasons: 1. That there was no privity of estate between the Keokuk & Western Company and the M. I. & N. Company, because the K. & W. Company had purchased under a mortgage which had been granted prior to the suit against the M. I. & N. Company; that neither the trustee under the mortgage nor the bondholders had been parties to that suit, and that as an estoppel must be mutual, the judgment, if one had been rendered in favor of the county for taxes, would not be an estoppel against the trustee under the mortgage, and, therefore, could not be an estoppel in favor of a purchaser under foreclosure by such trustee.

2. The Court said that a suit for taxes for one year was not a bar to a suit for taxes for another year. We quote:

> "The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac, 94 U. S. 351."

The Court then quotes largely from this case, and quotes from the case of Davenport v. Chicago Railway, 38 Iowa, 633, which

we have above cited. Again, the court held that a suit by certain stockholders of the M. I. & N. Railroad Company against the company itself and against the County Court and officers of certain counties to enjoin the collection of taxes for 1881 was not such a suit as would raise an estoppel against the county, even though successful, because the Keokuk & Western Railroad Company, or the trustee under the deed of trust which was foreclosed, would not have been bound by an adverse decision.

We especially call the attention of the court to the fact that it appears in K. & W. R. R. Company v. Missouri, 152 U. S. 313, and in the Supreme Court of Missouri, Missouri v. K. & W. R. R. Co., 99 Missouri, that in the former adjudication which was attempted to be applied in bar it had been conceded and not decided that the exemption belonging to the original company had passed to the consolidated company. The question in the new case turned upon this conceded proposition, and the court held under the principles laid down in Cromwell v. County of Sac, and the other cases which we have cited, that the parties were only bound by such questions as had been decided in the former case, and not also by questions which might have been but were not in fact decided.

Here, again, we perceive the radical difference between this case and those at bar, because it only requires an inspection of the record, including the opinion of the Court of Appeals in these bank cases, to show that the very question here attempted to be made by the banks in regard to their contracts *were* made, and that the cases turned upon those very questions.

In Mills, Guardian, v. Hopkinsville, 11 Ky. Law Rep. 164, this state of the case appeared: One Mills had died, leaving an infant daughter. The domicile of the decedent had been in the city of Hopkinsville. The father appointed one Landes guardian of his daughter. The young girl lived for awhile in Hopkinsville where her guardian lived, but afterwards moved to Bowling Green. The question arose as to whether her personal property was taxable in Hopkinsville. The taxes had been paid,

and the guardian was suing to recover them. It appeared that the taxes sought to be recovered by the guardian were for the years 1886 and 1887. In September, 1886, the parties to this action had submitted an agreed case to the Christian Circuit Court, in which the guardian sought to enjoin the collection of the taxes for 1886 upon precisely the same grounds upon which he now sought to recover back the money. It was held that the taxes were legally assessed, and the court dismissed the action. There could be no appeal, owing to the amount in controversy. The court said:

> "That judgment is unquestionably decisive of appellant's right to recover back the taxes for 1886. The matter is *res adjudicata*. It is at least questionable whether it is not also decisive of the right to recover back the taxes for 1887. It is true the appellants did not in the former suit seek to enjoin the collection of taxes for the last named year, but the parties were the same as in this action; the facts upon which relief was therein sought as to the taxes of 1886 were precisely the same as those now presented, upon which the appellant bases his claim to recover back the taxes paid for both years. The same identical question is now presented. Before, it related only to taxes for the one year, while now it relates to both years. The ground upon which relief is sought is, however, precisely similar. The court is now asked to determine the same question between the same parties and upon the same facts. . . . While we think the doctrine of *res adjudicata* should in reason and upon authority be applied to appellant's entire claim, yet another point is decisive of this case beyond question."

In this Kentucky case it will therefore be perceived that the doctrine of *res adjudicata* is applied to a tax case just as to any other.

A very strong case is that of St. J. & G. I. R. R. Co. v. Steele, 63 Fed. Rep. 867, S. C., 27 U. S. App. 436, United States Circuit Court of Appeals for the eighth circuit, Brewer, Circuit Justice; Sanborn and Thayer, Circuit Judges; opinion by Judge Thayer. It is to be observed that this case was decided October 8, 1894, whereas the case of K. & W. R. R. Co. v. Mis-

souri, 152 United States, 301, was decided March 12, 1894; and although the case we are now dealing with does not cite the other case, yet it can not be doubted that the court was fully aware of what had been decided in it. In this case it appeared that the railroad company had filed a bill against one Steele, sheriff of Doniphan County, Kansas, to restrain him from selling a portion of a bridge across the Missouri River under a tax warrant. The question was as to whether the bridge had already, under the law of Kansas, been included in the general assessment of the railroad property.

It appears that the railroad company had filed another bill against the former sheriff of Doniphan County, and in this suit it had been finally adjudged and determined that the right to assess the bridge for the purpose of taxation was vested by the law of Kansas in the local township assessor, and not in the Board of Railroad Assessors.

This judgment in the former case was pleaded in the latter case. The Circuit Court of Appeals held that the former judgment was a bar to the subsequent proceeding, notwithstanding that the second proceeding was against a different sheriff and for a different year's taxes. The court said that the ultimate point to be decided in the former case was, whether the bridge was subjected to assessment by the local township assessor, and that the decision of that question turned upon the further inquiry, whether it was, in fact, a toll-bridge within the meaning of the Kansas statute which permitted toll-bridges to be assessed by local assessors. And the court held that this was the same question to be decided in the new case, and the result was that the decree in the suit against the former sheriff was held to operate as an estoppel, and to preclude the complainant in the action from contending to the contrary from what was therein found and determined, namely: That the bridge in question was a toll-bridge, and, as such, subject to assessment by the local authorities of the county.

This case has been carried to the Supreme Court of the

United States, and has been there reversed with directions to dismiss for want of original jurisdiction. (St. Jos. & G. I. Co. v. Steele, 167 U. S. 660.)

An authority, however, which the Circuit Court held to be conclusive of the question at bar is that of the city of New Orleans v. Citizens Bank of Louisiana, 167 U. S. 372. That was a bill filed by the Citizens Bank of Louisiana in the Circuit Court of the United States against the city of New Orleans, Board of State Assessors of the Parish of Orleans, and certain State tax collectors. The bill alleged that the complainant was contractually exempt from State and municipal taxation under its charter and the acts supplementary thereto.

It appeared that the bank was chartered in 1833. The term of the charter was to expire in 1884. In 1868 the State of Louisiana adopted a Constitution which directed that all property should be taxed in proportion to its value, provided that "the General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes."

In 1874 the General Assembly passed an act extending the charter to the year 1911. It appeared that prior to the time that the charter would have originally expired there had been certain litigations between the bank and the taxing authority, under which it had been adjudged that the bank could not be subjected to taxation. After the bank had entered upon the period of its extended existence, there were two suits determined in the Civil District Court which were not appealed. In each of these cases it was held that the bank was not subject to taxation. The *res judicata* of all these suits was set out in the bill of complaint. The court, however, in considering the question, eliminated all the judgments rendered prior to the period when the amended charter took effect, and confined the examination to the two judgments rendered by the Civil District Court, one as to the taxes for 1886 and the other as to those for 1887. The court said:

"The reason relied on to establish that these judgments do not constitute the thing adjudged are embodied in three propositions: *First*, because although it is true the officials who are made defendants are the successors in office of the officers who were impleaded in the judgments relied upon, as they are not the same natural persons, therefore there is a want of identity of parties; *second*, because the records do not show with sufficient certainty that these judgments were based on the identical claim of exemption from taxation which is now asserted, and therefore that the judgments do not establish that the matter here in issue was necessarily therein concluded; *third*, because whatever as a general principle may be the efficacy of the thing adjudged, that rule has no application to taxes of different years, since a judgment decreeing a tax of one year illegal can never be *res judicata* as to a tax of a future year—although the right to tax for a future year is resisted upon the same facts and between the same parties, and upon the identical legal grounds held to be conclusive in a judgment previously rendered between them. . . .

"The first contention based upon the mere change in the person holding the particular office is without merit. It is not denied that the tax collectors and board of assessors who stood in judgment in the suit when the decisions were rendered were duly qualified and empowered to that end. And it is also not gainsaid that the successors in office of those officers who are defendants here are also duly empowered. The mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged. (Scotland County v. Hill, 112 U. S. 183; Harshman v. Knox County, 122 U. S. 306; State v. Rainey, 74 Mo. 229; Harmon v. Auditor, 103 Illinois, 122.)

"The second question, then, is this: Were the final judgments which held that there was no power to levy the taxes on the Citizens Bank for the years 1886 and 1887 based upon the identical claim of exemption now asserted by the bank in order to defeat the taxes here in question?

"The petition filed by the bank in the suit, by it commenced, to have the taxes of 1886 on stock canceled and annulled is set out in full in the margin. It will be seen that it specifically averred the charter of the bank, and that under its provisions the bank could not be taxed, and to do so would impair the contract obligations created by the charter, and would be violative of the Constitution of the State of Louisiana and of the United States. It, moreover,

referred to the previous adjudication by the Supreme Court, and contained an allegation that the assessments, besides 'being illegal and without warrant of law, were excessive.' But the relief prayed was not the correction or reduction of an excessive assessment, but solely that the assessment be decreed 'void and null,' and be 'canceled and annulled.'

"The answers of the defendants asserted the legality of the assessment and denied the right of the bank to question the amount, because it had not availed itself of the antecedent statutory remedies necessary to entitle it to assert such right. The judgment rendered upon these issues decreed, not that the tax was excessive, not that it should be reduced, but that it was null and void, and must be canceled.

* * * * * * * * * *

"The judgment rendered for the tax of 1887, if it were possible, was even more conclusive of the identity of the issue than the one rendered for the taxes of 1886. In that case the suit was brought by the bank, not to assail an assessment which had been actually made, but to enjoin the making of any assessment against it whatever. The petition which is set out in the margin stated no ground for relief other than the claim of exemption. Indeed, the very nature of the remedy invoked precluded the possibility of any other ground, since the relief sought related not to an assessment already made, but to prevent any assessment whatever under the existing law of objects named from being made. How can it be contended that the assertion in the pleadings, that there was no power to make any assessment at all of the specified property, was simply a claim that an assessment was irregular? The judgment . . . was responsive to the issue presented, and enjoined in the making of any assessment for taxes for the year 1887. . . .

"It results from the foregoing that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive, unless the proposition be sound that a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year can not be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defense, and of the facts upon which the defense is founded.

"There is difficulty in meeting the argument by which the foregoing proposition is supported, because the reasoning commingles and treats as one two distinct and different questions. For instance, the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of *res judicata* to demands for taxes, but contends that wherever there are different demands the thing adjudged has no application, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances.

"On the other hand, the reasoning that this must be the rule because it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year, has for its basis the proposition that as a matter of public policy and public necessity the principles of the thing adjudged can never apply to taxation. In considering the question we separate at once these two conflicting contentions and examine first the proposition that, because a tax of one year is a different demand from the tax of a subsequent year, therefore *res judicata* as to one can never apply as to the other; and the second question, of whether as a matter of public policy the thing adjudged applies to taxes at all.

"The proposition that a suit for a tax for another, therefore *res judicata* can not apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

The court here relies on various authorities which we have already considered in this brief, among others Tioga R. R. Co. v. Blossburg R. R. Co., 20 Wall. 137; Mason Lumber Co. v. Buchtel, 101 U. S. 638; Cromwell v. Sac, 94 U. S. 353; Last

Chance Mining Co. v. Tyler Mining Co., 157 U. S. 687, also upon a Louisiana case, and then proceeds:

"It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

"The argument that, as a matter of public policy, the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law-making and not to the judicial department. But if the judicial mind could entertain the suggestion, it seems clear that it is without real merit. In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies: To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the case under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court, from the foundation of the government, declaring a particular tax or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged; for, manifestly, if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel can not also result from a judgment enforcing taxation.

"It is contended, however, that the asserted theory finds support in two authorities: one a decision of this court,

Keokuk & Western R. R. v. Missouri (152 U. S. 301), and the other, Davenport v. Chicago, Rock Island, etc., Railway (38 Ia. 633, 640). But that these authorities do not sustain the contention is demonstrable. In the Keokuk case, the court held that the controversy which it decided was not between the same parties as was the controversy in the case wherein the judgment was rendered, which was relied upon as *res judicata*. The two judgments, not being between the same parties, could have been and was no necessity for deciding whether, if the judgment had been between the same parties or their privies, it would have been *res judicata*. True it is, that in the Keokuk case the opinion *arguendo* discusses the question of whether a judgment against the validity of a tax for one year would be a bar to a suit for taxes for a subsequent year. But that this reasoning was not considered as relating to a case where the validity of the tax was resisted on a particular ground, which particular and special defense had been previously held between the same parties to be valid under identically the same conditions and circumstances, becomes clear when the context of the opinion is examined, and it is discovered that it approves and quotes the case of Cromwell v. Sac, the opinion in the Keokuk case saying: 'If there were any distinct question litigated and settled in the prior suit, the decision of the court upon this question might raise an estoppel in another suit upon the principle stated in Cromwell v. Sac, 94 U. S. 351.' To seek, then, to avail of the general language used in the opinion in the Keokuk case, without taking note of the circumstance that it was there said that the estoppel would exist even as to a tax in a case like this, is, in reason, to misinterpret the opinion and make it cover the very case which it in express language declared it was not intended to govern. It may also be conceded that language was used in the course of the opinion in Davenport v. Chicago, Rock Island, etc., Railway (*supra*), which is susceptible of the interpretation that under no circumstance, even between the same parties, would a judgment as to the tax of one year operate as the thing adjudged as to the tax of a future year. But that case stands alone, and the language therein used has been since, if not repudiated, at least qualified by the Supreme Court of Iowa to the extent necessary to bring that case in harmony with the true and universal doctrine so often laid down by this court. In Goodnow v. Litchfield (59 Ia. 226), where the Davenport case was pressed as an authority upon the Supreme

Court of Iowa, that court, in an opinion on a rehearing, said:

"'It is undoubtedly true that the taxes of each year ordinarily constitute separate and distinct rights or causes of action. But when an action is brought to recover taxes paid in one year, and an action is afterward brought to recover for the taxes paid in a subsequent year, and the adjudication in the first is pleaded as a bar to the recovery in the second action, the question whether the estoppel is effectual will depend upon the issues in the two actions.

"'If the right to recover and the defense thereto are based upon necessarily the same grounds, why litigate again the question that has been determined? In such case the very right of the matter is determined by a court of competent jurisdiction. It is not essential that the causes of action should be the same, but it is essential the right or title should be; that is, the issues in both actions and the matter on which the estoppel depends must be the same or substantially so. The very matter or thing which it is sought to litigate must have been adjudicated in the prior action. In such case the bar or estoppel is complete. This rule will not, we think, be disputed. Therefore authorities are not required in its support; but see Merriam v. Whittemore, 5 Gray, 316.'

"It follows, then, that the theory by which it is sought to take questions of taxation entirely out of the reach of the rule of the thing adjudged, is not only without foundation in reason, but is also without support of authority, since the case from this court, which is cited to sustain it, can not properly be said to maintain the contention, and the other from the Supreme Court of Iowa has been either overruled or qualified."

This case is in all respects so apposite that we forbear any comment upon it, but rely upon its judgment and its reasoning as fully conclusive of the question here at bar.

It was cited and applied in Sou. Pacific Co. v. U. S., 168 U. S. 51, as one of the latest expressions of the Court on the subject of *res adjudicata*.

We submit, therefore, that the cases relating to taxation proceed upon the same principles as other cases.

Various reasons are given why the Bank of Kentucky can not

rely upon the judgments rendered in its favor as determining, by the presumption of the thing adjudged, the existence and the character of its contract. Running through the argument of counsel upon the other side, there seems to be an idea that because the Bank of Kentucky stated what its rights were, besides stating what they had been adjudged to be, it thereby set the whole matter at large, and prevented itself from relying upon the adjudications as conclusive evidence of the truth of its allegations in reference to its rights.

Whatever doubt there may have been upon this subject at one time, this court has settled the law to be, that a party may rely upon a record, and judgment in a former case, without specially pleading, with the same effect as if he had pleaded it. Thus this court in Southern Pacific Railroad v. United States, 168 U. S. 59, said:

> "That the record and judgment in the former cases were admissible in evidence without being specially pleaded we entertain no doubt. . . . There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issues to which it relates, but is only persuasive evidence, and that the court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon principle the former judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it. Mr. Greenleaf correctly says that 'the weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence it is equally conclusive in its effect as if it was specially pleaded by way of estoppel. (1 Greenleaf on Evidence, Sec. 531.)' This view is in accord with the decisions of this court above cited."

If a record can be given in evidence, without being specially pleaded at all, *a fortiori* it can be used where it is specially pleaded, and the fact that the pleader also sets out what his rights were, in accordance with the judgment so alleged by him, can not prejudice the effect of the judgments as establishing the truth of his allegations.

There is another ground which is set up as avoiding the effect of these judgments, and that is, the assertion that where a litigant comes into a court of chancery he can not rely upon a judgment theretofore obtained by him unless such judgment can be shown to be without error.

It is quite obvious from the mere statement of this proposition that the highest form of evidence, viz., presumption from the thing adjudged, can never avail the complainant in a suit in equity, because if he must show not only the judgment but that it is without error, his showing of the judgment is a mere matter of supererogation. But such is not the law. It would extend this brief too long to attempt to go into the exceptional cases relied on to establish this proposition. They are, it seems to us, well summed up by this court in the case of Gay v. Parpart, 106 U. S. 699, where Mr. Justice Bradley, delivering the opinion of this court, adopts the opinion of the court of first instance in the following terms:

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem. In outward semblance this partition decree is a decision of court upon the relative rights of Charles D. Flaglor and his children, under the will of Garrett. In essential character it is but the judicially recorded supposed agreement of Flaglor. And upon an appeal to equity by original bill to lend its assistance for carrying it into execution, because of an omission in the decree in providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of

> any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension and want of consideration, to remain passive. (Wadhams v. Gay, 73 Ill. 415.)"

The case of New Orleans v. Citizens Bank, 167 U. S. 371, was one, as we have heretofore shown, on all fours with the case at bar. It was a suit to enjoin the collection of taxes, and the right of the complainant to its contract was established by producing records in which it had been adjudged that such contract existed. The court found no hesitancy in granting the relief.

So in Southern Pacific R. R. Co. v. United States, 168 U. S., page 1, the United States filed a bill in equity to quiet its title to certain land, and produced in evidence, as establishing its title, the record of a former suit between it and the defendant. The court gave the relief to the United States and refused to examine any evidence which might contradict the conclusions of the former judgment (see pages 62 to 66).

Another ground urged by the counsel for the city of Louisville is that the proceedings and judgment in the case of the bank against R. H. Thompson, Judge of the City Court of Louisville, was not such as to establish the right and contract of bank. The record of this suit will be found, Case No. 356, R. 77, 89. The judgment in that case we have heretofore quoted. We again call attention, however, to the fact that its language is as follows:

> "It is considered by the court that the prayer of the petition be granted, and that the City of Louisville and R. H. Thompson, Judge of the Louisville City Court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, the Bank of Kentucky, in the city of Louisville, or making any further order therein. And it is further considered that the plaintiff recover of defendant, the City of Louisville, its costs herein expended, and may have execution therefor. To all of which defendants except and pray an appeal to the Court of Appeals, which is granted."

At page 89 appears the record of this case in the Court of Appeals of Kentucky, and it there appears that the appellants were the City of Louisville and R. H. Thompson, Judge of the City Court of Louisville.

In order to ascertain what are the issues in a cause, we know of no better way than by looking at the pleadings in the cause. In order to ascertain what was decided in a cause, we know of no better way than looking at the opinion in the cause. We mean that if it is desired to find out actually—not technically—what was involved in a controversy, there is no better method than the one we have above stated.

If the court will look at the petition of the Bank of Kentucky at R. 78, it will find that it rested its whole right upon its contract with the State, and the contention was that the ordinance was a violation of this contract right. If the court will look at the opinion of the court (Judge Field) at R. 85, it will find that this is the only question discussed by him. The case went off on demurrer to the petition.

As a matter of fact, therefore, no one can doubt what was the matter at issue in this cause, and unless there is some rule of law requiring the court to be blind, it must inevitably see that the only question involved, and the only question decided, was as to the contract right of the bank to commute its taxes under the Hewitt Law.

Exactly this same thing is true in reference to the proceedings and opinion and judgment in the Court of Appeals. The opinion of the Court of Appeals dealt with this contract right of the bank to so commute its taxes, and with nothing else. The learned counsel for the city of Louisville insists that the court might have decided that the ordinance was void, because the legislature had no right to grant to the city of Louisville the power to impose a license tax in lieu of an *ad valorem* tax; and cites the case of Levi v. City of Louisville, 97 Ky. 394, decided nearly a month before the bank cases reported in 97 Ky. 590, as establishing this proposition.

It must be admitted that the question determined in the Levy case was not in fact raised in the bank tax cases. The pleadings do not raise it; the opinion of the court of first instance does not refer to it, nor does the opinion of the Court of Appeals in any way touch upon it. Under these circumstances, suppose the matter were turned round, and we were claiming that we had established, as a matter of *res adjudicata*, by our proceedings, that the legislature could not authorize the city of Louisville to levy a license tax in lieu of an *ad valorem* tax, and attempted to prove this by the record presented to the court in this cause—is it not perfectly obvious that the learned counsel would reply: Whether or not you might have raised such a question, and whether or not the court would have decided it if you had raised it, it appears from all the proceedings, both in the court of first instance and in the Court of Appeals, that you did not raise it and that it was not passed on?

It is a mistake to say that we were not entitled to remedy by prohibition. Indeed, that was our only remedy. It is true the statute in this case provides (Section 2922, Kentucky Statutes) that the prohibition suit should only apply to an ordinance where a fine of twenty dollars or less was imposed by the ordinance. But in the case at bar the minimum fine imposed by the ordinance was five dollars; the maximum, one hundred dollars. Under the contention of the counsel there would be no remedy whatever, either by appeal or by writ of prohibition, in such a case, unless the court should impose a fine of as much as twenty dollars.

This, however, is quite beside the question. The Jefferson Circuit Court did take jurisdiction of the proceedings in prohibition; did render its judgment, and that judgment has been affirmed; and it is quite too late to raise such a question as this.

Another ground of objection is that the writ of prohibition is a criminal proceeding. Undoubtedly it must be admitted that under the Kentucky Code of Practice the writ of prohibition is a civil proceeding. It is provided for and the practice in ref-

erence to it prescribed in the Civil Code of Procedure. (Civil Code Kentucky, Chapter XII.)

We are, however, quite content to rest this part of the case upon the opinion of Judge Taft, from which we make the following extract:

> "The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its jurisdiction because proceeding under a void law. To that writ of prohibition the city of Louisville was not formally made a party in the Jefferson Circuit Court, but the litigation before the Jefferson Circuit Court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson Circuit Court to the Court of Appeals, the appellants were the City of Louisville and the Judge of the Police Court. By this means the city of Louisville formally made itself a party to the record, and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution, it might have been attached for contempt. (Bac. Abr. "Prohibition," M.) It is urged that the litigation was really a criminal litigation, and that a judgment in a criminal case can not be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil, and the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. (Armstrong v. County Court, 15 W. Va. 190; Walton v. Greenwood, 60 Me. 356.) However this may be, the city of Louisville,

admitting its interest, did appear as appellant, and so made itself a party to the whole litigation, and was so treated by the Court of Appeals of Kentucky."

Quite a different question is raised against the Bank of Kentucky by the learned counsel for the county of Franklin and the city of Frankfort. It is argued that the judgments rendered in favor of the Bank of Kentucky in the Franklin Circuit Court, in the two suits (one of which was brought against the county of Franklin and the other against the city of Frankfort) have been appealed to the Court of Appeals of Kentucky, and that pending this appeal these judgments have no force as *res adjudicata.*

The precise facts are important to be here noticed. The Bank of Kentucky brought two suits—one to enjoin the authorities of Franklin County, and the other to enjoin the authorities of the town of Frankfort from levying taxes upon the property of the branch bank carrying on business within the boundaries of those municipalities. The ground of suit in both instances was exactly that asserted now, viz., the contract which the Bank of Kentucky had made with the State by its original charter, and the altered contract made by the Bank of Kentucky with the State under the Hewitt law. In each suit the right of the bank to resist these taxes under this contract was set out fully, and the municipalities were asked to be enjoined from the violation of the contract rights of the bank.

To the petitions of the bank in each case demurrers were interposed by the municipalities. The learned judge holding the Franklin Circuit Court sustained the demurrers in each case, holding, in an opinion which is copied in the record, No. 356, page 50, that the contract under the Hewitt law was subject to cancellation by the State, and had been voided by appropriate legislation. From the judgment dismissing these petitions an appeal was taken by the Bank of Kentucky to the Court of Appeals, and, as we have heretofore pointed out, these were two of the cases decided by the Court Appeals and reported under

the style of Bank Tax Cases, 97 Ky. 590. The mandate in each case, addressed to the lower court, was to set aside its judgments dismissing the petitions, and to enter a judgment in conformity with the opinion of the Court of Appeals.

Thereupon the Franklin Circuit Court, in obedience to this mandate, on January 21, 1896, entered a judgment in each case, enjoining the municipalities from endeavoring to collect the taxes complained of, and fully establishing the contract right of the bank during the continuance of its charter life.

Two years after the decree was thus entered in obedience to the mandate of the Court of Appeals, the defendants in these two cases, viz., the City of Frankfort and Franklin County, appealed from these judgments to the Court of Appeals. It is this appeal from judgments rendered by the Franklin Circuit Court, in obedience to the mandate of the Court of Appeals of Kentucky, that is said to avoid the presumption from the thing adjudged herein asserted by the Bank of Kentucky.

This is, of course, no place to argue whether or not the judgment entered by the Franklin Circuit Court, in pursuance to the mandate of the Court of Appeals, did in fact conform to that mandate in form as well as substance. But it will hardly be denied that such a case is much stronger than one in which a judgment originally entered by the Circuit Court upon its own consideration of the question has been appealed from.

We respectfully submit that this contention of the learned counsel for the city of Frankfort and county of Franklin is met by either one of two propositions: First, a pending appeal does not affect a judgment as *res adjudicata*, and this is especially the case where nothing has been done to suspend the judgment by the execution of a bond or other appropriate proceeding. Second, we submit that whether or not the opinion of the Court of Appeals in 97 Ky. 590, is the law as applied to other cases, it is the law as applied to the cases in which it was rendered, without regard to the fact that it may be sound in argument or entirely erroneous.

The following is the judgment entered by the Franklin Circuit Court, in the case against the City of Frankfort, upon the return of the case from the Court of Appeals (R. 76):

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the Court of Appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that Article 2, of the Act of the General Assembly, entitled, 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886 (Gen. Stats., Chap. 92, Art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes, or in a different mode or at a greater rate of taxation than as provided for in said Act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business: That the provisions of the present Constitution of this State and of the Act of November 11, 1892 (Art. 3, Chap. 103, Acts 1891–2–3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property, or franchise, except to assess a tax for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void: That the Board of Valuation and Assessment provided for in said Act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now hereby, made perpetual, and the defendants be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

The following is the judgment of the Franklin Circuit Court, entered in the suit against the County of Franklin, in pursuance of the mandate of the Court of Appeals (R. 57):

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the Court of Appeals heretofore filed, reversing the former judgment of this court, and the Court being now sufficiently advised: It is adjudged that Article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, (Gen. Stats., Chap. 92, Art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business: That the provisions of the present constitution of this State and the Act of November 11, 1892 (Art. 3, Chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess a tax for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void: That the Board of Valuation and Assessment provided for in said Act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation: That the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purpose of Franklin County upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

In Kentucky there was for a long time a peculiar practice in injunction suits. Where an injunction had been granted originally and was dissolved on final hearing, the bill being dismissed, an appeal, with supersedeas, reinstated the injunction. Yocum v. Moore, 4 Bibb. 221; Talbot v. Morton, 5 Lit. 326; Smith v. W. U. T. Co., 83 Ky. 269; E. R. R. Co. v. Ashland R. Co., 94 Ky. 478.

To the contrary, however, where the injunction was made perpetual by the final decree, an appeal with supersedeas did not dissolve the injunction, but a party was subject to proceedings for contempt who violated it, pending the appeal. K. & I. B. Co. v. Krieger, 91 Ky. 625.

This matter was finally fixed by statute. The following is Section 747 of the Civil Code of Practice of the State of Kentucky:

> "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued. The provisions of the Civil Code concerning supersedeas on appeals shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions. When an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal upon such terms as to bond or otherwise as may be proper for the security of the rights of the opposite party. Either party, within twenty days after the entry of such order, may take a transcript of the record, or all parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party move the Court of Appeals, or, if in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified or continued pending the appeal. Pending such application to the Court of Appeals or judge thereof, but not longer than for twenty days, the status existing immediately before the entry of the judgment appealed from shall be maintained, and the lower court shall so provide in the judgment upon the request of either party. If, at any time, upon reasonable notice to the party affecting,

> it may be made to appear that the sureties upon the bond required in the court below are insufficient, the Court of Appeals, or a judge thereof in vacation, may set aside the order suspending, modifying or continuing the injunction pending the appeal, unless sufficient surety be furnished by a day fixed by the court or judge."

Under this it is apparent that the appeal from the judgments given above have no effect whatever upon their binding force. In other words, they must be obeyed until reversed.

A writ of error from this court does not vacate the judgment below. This is expressly decided in Railway Co. v. Twombley, 100 U. S. 81. In that case judgment had been recovered on a right of action given by a statute. Pending a writ of error to this court, the statute was repealed. It was insisted that this made an end to the cause of action, but this court held to the contrary. It said:

> "A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition."

So this court has held consistently that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court. Slaughter House Cases, 10 Wall. 297; Hovey v. McDonald, 109 U. S. 161; Leonard v. Ozark Land Co., 115 U. S. 468.

The case of Hovey v. McDonald is particularly pertinent. At page 161 is given the rule adopted by this court in October, 1878, which is quite like the Section 747 of the Civil Code of Practice of the State of Kentucky above cited, in giving the power to suspend or modify an injunction during the pendency of an appeal. In reference to this Mr. Justice Bradley says (page 162):

> "Of course where the power is not exercised by the court nor by the judge who allows the appeal, the decree retains its intrinsic force and effect."

Such is the rule in Kentucky. A judgment or decree (under our present practice all are judgments) stands in full force and effect until reversed. An appeal does not stay proceedings even unless a supersedeas be issued. (Section 747 of the Civil Code, *supra*.)

In Dupuy v. Johnson, 1 Bibb, 565, the court said:

> "That a judgment or a decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it never can be overhauled or its correctness questioned in an original suit, is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion."

In Allen's Heirs v. Hall's Heirs, 1 Marshall, 526, the court said:

> "There is no doubt but that the parties to a suit either at law or in the chancery are bound by the judgment or decree pronounced therein, and are bound thereby, while it remains unreversed, from rediscussing in another suit the matters thereof, and their privies are alike bound and barred."

In Cates v. Loftus' Heirs, 4 Monroe, 443, there was a bill in equity to which the defendant answered, pleading a decree which he had obtained in another cause between himself and the complainant, and it was insisted that this decree was a bar. The Circuit Court dismissed the bill, holding that the bar was valid. The Court of Appeals affirmed the judgment. It said that it knew that since the decree under examination was rendered the decree pleaded in bar had been reversed, but that the court was bound by the record, and must affirm the decree which was rendered prior to the time of such reversal.

This seems to us decisive of the present controversy.

In Bank of Kentucky v. Van Meter, 10 B. M. 66, it appeared that a decree was rendered directing the sale of certain property. One of the parties prayed an appeal from this decree. Under the law he was entitled to execute bond within forty days thereafter. Within those forty days the decree was executed by

a sale of the land. The decree was subsequently reversed; and thereupon the litigant who had thus succeeded in reversing the decree of sale endeavored to have the sale set aside; but the court decided to the contrary, expressly holding that the granting of an appeal does not *ipso facto* suspend the judgment or prevent any proceeding for its enforcement.

In Kaye v. Kean, 18 B. M. 846, there was no action for malicious imprisonment. It appeared that one Kean had applied to the Jefferson Circuit Court for a mandamus upon the common council of the city of Louisville to grant him a tavern license. The Circuit Court granted the mandamus. The council refusing to obey, the members were imprisoned. On appeal the judgment for the mandamus was reversed, and the petition ordered to be dismissed. Thereupon one of the members of the council sued Kean as above; but the court held that the judgment of the Circuit Court must have been obeyed pending the appeal and until it was reversed.

These cases seem to us to abundantly support the proposition that such a judgment as we have here pleaded is in full force and effect for all purposes, notwithstanding an appeal may be pending from it.

And, as we have insisted above, this must be true *a fortiori*, because whatever may be the law in any other case, the opinion of the Court of Appeals in this case is the law of this case.

That the opinion of the Court of Appeals in a case is binding as *res adjudicata* upon the Court of Appeals on a second appeal has been frequently held in Kentucky. We need only refer to such old cases as Morgan v. Dickerson, 1 Monroe, 20; Carlisle v. Long, 3 Marshall, 435; and to so new a case as Smith v. Brannin, 79 Ky. 117. The last case is particularly striking, as holding that where there was an equal division of the court upon the first appeal the decision of the vice-chancellor, from whose court the appeal had been taken, so far as concurred in by two judges, was the law of the case upon any subsequent appeal.

We do not think it necessary to examine the many cases cited

in the text-books upon the subject of the effect of an appeal upon a judgment offered to be pleaded in bar. These cases at last turn on the question as to the effect of the appeal upon the judgment sought to be reviewed. Where this effect is to nullify or vacate the judgment so that there is no judgment until the appellate tribunal has passed upon the appeal, then of course the judgment thus vacated or nullified is not good in bar as *res adjudicata*. On the contrary, where the appellate tribunal does not try the case *de novo*, but its power and authority are confined to an affirmance, reversal, or modification of the judgment of the tribunal of first instance, then until the judgment is modified or reversed it is effectual for all purposes, and, among others, as a bar to another proceeding involving the same matter.

This explanation of these cases is given with great clearness by Judge Deady in Sharon v. Hill, 26 Fed. Rep. 345. It was there held that a judgment of the Superior Court of California pleaded in bar could not be so used, as it appeared that the judgment was pending upon an appeal, and the California Code provided that an action should be deemed to be pending from the time of its commencement until its final determination upon appeal. The appeal, therefore, was held to be as much a step in the case as the original decision of the tribunal of first instance.

The matter is also stated with entire clearness by the Supreme Court of Connecticut in the case of Bank of North America v. Wheeler, 28 Conn. 433. Many cases to the same effect are cited in 1 Freeman on Judgments, 4th Ed., Section 328, note.

So also in Faber v. Hovey, 117 Mass. 108, where there was an action upon a judgment rendered in a court of the State of New York, from which an appeal was still pending, the court said:

> "The case stated shows by the law of New York an appeal does not vacate the judgment appealed from or stay execution unless the appellant gives security to pay the judgment with costs and damages if it is affirmed, and corresponds in this respect rather to a writ of error or review than to an appeal under our practice. It follows that the

judgment recovered by the plaintiff against the defendants is in full force notwithstanding the appeal, and that the plaintiff is entitled to maintain his action thereon. And so are all the authorities."

We therefore submit that the pendency of an appeal from these judgments in no way affects their validity or their effect when pleaded or given in evidence in the controversy now at the bar.

The question made by the defendants, the county of Franklin and the city of Frankfort, in paragraph 20 of their answer (R. 108), and noticed by the Circuit Court in the conclusion of its opinion (R. 163), need not be further noticed, as it is not embraced in the assignment of errors (R. 165) nor mentioned in the brief of counsel.

In conclusion, we respectfully submit that the decree appealed from should be in all respects affirmed.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
For Appellee.

APPENDIX.

THE HEWITT ACT.

SECTION 1. That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation as is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

SECTION 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the Auditor of Pub-

lic Accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and 20 per cent upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths:

> "I ——— ———, swear (or affirm) that I am the ——— of ——— ———, and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulations of said ———, and how or in what said surplus, undivided profits, or undivided accumulations is invested."

SECTION 3. If any such bank, institution or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits, or undivided accumulations than an amount equal to 10 per cent of such capital stock, the excess of the amount so invested over the amount equal to 10 per cent of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

SECTION 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular

or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right, under the acts of Congress or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

SECTION 5. The said banks may take the proceeding authorized by Section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, they pay the tax provided in Section 1 from the passage of this act.

SECTION 6. This act shall be subject to the provisions of Section 8, Chapter 68, of the General Statutes.

SECTION 7. If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in Section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits shall be assessed as directed by Section 2 of this act, and the same taxes—State, county, and municipal—shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: *Provided*, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

STATUTORY METHOD OF COLLECTING TAXES.

SECTION 4129. *Sheriff to collect unless law otherwise directs.*—The Sheriff, by virtue of his office, shall be collector of all State, county, and district taxes, unless the payment thereof is, by law, especially directed to be made to some other officer.

SECTION 4148. *Sheriff may distrain—Compensation for collecting taxes—Limit.*—The sheriff, from and after the first day of March in each year, shall collect the taxes due in his county, and upon failure by the persons bound therefor to pay the same, may distrain the goods and chattels owned by or in the rightful possession of the persons from whom the tax is due, notwithstanding the existence of any lien upon the same; and may proceed to sell the title of such person in so much thereof as will pay the tax due and all costs, in the mode prescribed by law. Sheriffs shall be allowed by the Auditor the following commission upon the sums collected and accounted for or paid into the treasury in each year: Upon the first $5,000, 10 per cent, and upon the residue, 4 per cent; *Provided*, that in no case shall the aggregate annual compensation of the sheriff for official services exceed $5,000, independent of the compensation of legally authorized deputies and assistants.

SECTION 4151. *Real estate sold if no personalty found—Advertisement and sale—Costs.*—If there be no personal property that the sheriff or tax collector can distrain for taxes due, and the same shall not be paid by the first day of July, the sheriff or tax collector shall sell for cash any real estate belonging to or listed by such delinquent taxpayer, or so much thereof as will pay the taxes due and his commission, in the same manner that lands are sold under execution, except that the land shall not be valued or levied on, and shall be advertised by posting, for fifteen days before the sale, a written or printed notice at the court-house door, and by publication once a week for four weeks prior to the day of sale in a newspaper of general circulation, if there be one in

the county; if not, then by printed hand-bills posted for fifteen days before the sale at the court-house door, and in three or more conspicuous places in the tax district; and he shall, not less than fifteen days before the sale, mail to the delinquent a postal card addressed to his place of residence or place of business, if such can be ascertained, notifying him of the time and place of the sale; and in order to cover the cost of such advertisement and notification, the sheriff shall have two dollars for each person whose property is advertised, to be paid by the delinquent, but in no event to be paid by the State.

SECTION 4184. *Form of notice to person indebted to delinquent taxpayer.*—If the sheriff, his deputy, or other person having revenue, county levy, or other taxes of any character, or other public dues, in his hands for collection, believes another person to be indebted, in money or property, to the person owing taxes or public dues, and believes he can not otherwise collect the tax, he shall deliver, or cause to be delivered, to the person owing the taxes or public dues, and to the person owing him, anywhere he may be found, written notice in substance as follows:

"Mr. A B, the taxes due by C D amount to the sum of $——— ——cents. To that extent you are notified not to pay or deliver to him any money or property which you now owe, or may hereafter be indebted to him, and to appear before the county court of——— County on the first day of its next term, to show cause why you should not be adjudged to pay said taxes. This—— day of———, eighteen———.

"———, *Sheriff.*"

REVIEW OF CASES INVOLVING CONTRACTS.

The cases in which the remedy by injunction has been sought to protect a contract commuting taxation or exempting certain property from taxation are of two classes: One in which the remedy has been sought in the State court, and the case has come to this court by writ of error from the highest State court.

These cases are interesting, as showing what is the general State law on the subject. The other class embraces cases in which the remedy was originally sought in the Circuit Courts of the United States, and the case came to this court by appeal.

We do not pretend to say that the question of the jurisdiction in equity was discussed in these cases. Indeed, in only a few of them do we find the subject adverted to. But we believe that no better test can be made of the law as to the jurisdiction of a court of equity to grant an injunction than the ascertainment of whether or not jurisdiction has been actually taken in such cases. Nor do we pretend that if these cases are examined it will not be found, in many of them, that there were special circumstances, the existence of which would give jurisdiction—as the question of cloud upon title to land, or the avoidance of a multiplicity of suits. In many cases the facts show that there did exist one or the other of these circumstances; but in others, so far as the opinions in this court go (and we have not attempted to examine further than this), no such circumstances existed. And this jurisdiction has been assumed as well where it has been sought to enjoin the assessment of tax forbidden by contract to be exacted, as where it was sought to enjoin the collection of the tax.

A short statement of these cases is as follows:

Cases Brought Originally in Circuit Courts of the United States.

New Orleans v. Citizens Bank, 167 U. S. 372. Suit by bank against sundry sheriffs to enjoin the collection of taxes against the property of the bank.

Shelby County v. Union Bank, 161 U. S. 150. Suit by bank to restrain municipal authorities from collecting tax on surplus of the bank.

Keokuk R. R. v. Scotland County, 152 U. S. 318. Suit by Railroad Company against judges of three county courts in Missouri to enjoin collection of taxes.

Yazoo R. R. v. Board of Levy Commissioners, 132 U. S. 190. Suit against sundry tax collectors to enjoin collection of taxes on the railroad.

Picard v. East Tennessee Co., 130 U. S. 638. Suit to enjoin collection of taxes assessed by Board of Railroad Tax Assessors.

Huntington v. Worthen, 120 U. S. 99. Suit against sundry sheriffs to enjoin from collecting taxes assessed by Board of Railroad Commissioners.

Hoge v. R. R. Co., 99 U. S. 349. Suit to enjoin taxing officers of South Carolina from levying State, county, or municipal taxes upon property of the railroad company.

County of Calhoun v. American Co., 93 U. S. 124. Suit to enjoin municipal authorities from collecting tax on certain lands.

Bailey v. Magwire, 22 Wall. 216. Suit to enjoin Magwire, Collector of State, County, School, and City Taxes for county and city of St. Louis, Mo., from collecting certain taxes on the Railroad Co.

The Delaware R. R. Tax, 18 Wall. 208. Suit to enjoin the State Treasurer and Collector of State Taxes of Delaware from collection of certain taxes.

Humphrey v. Pegues, 16 Wall. 246. Suit to enjoin county officers from collecting certain taxes.

Tomlinson v. Jessup, 15 Wall. 454. Suit to enjoin certain officers of the State of South Carolina from levying a tax on the property of the Railroad Co.

Tomlinson v. Branch, 15 Wall. 460. Suit to enjoin State Auditor and certain county collectors from collecting certain taxes imposed on the Railroad Co.

City of Charleston v. Branch, 15 Wall. 471. Suit to enjoin Councils of Charleston to prevent collecting of certain taxes.

CASES ON APPEAL FROM THE HIGHEST COURT OF THE STATE.

Wilmington R. R. v. Alsbrook, 146 U. S. 279. Error to the Supreme Court of the State of North Carolina. Suit to enjoin the Sheriff of Halifax County from collecting certain taxes.

Yazoo R. R. Co. v. Thomas, 132 U. S. 174. Error to the Supreme Court of the State of Mississippi. Suit to enjoin sundry tax collectors against the collection of certain taxes.

Southwestern Co. v. Wright, 116 U. S. 231. Error to the Supreme Court of Georgia. Suit to restrain the collection of taxes.

Southwestern Co. v. Georgia, 116 U. S. 231. Error to the Supreme Court of Georgia. Suit to restrain the collection of taxes.

Chesapeake R'y Co. v. Miller, 114 U. S. 177. Error to the Supreme Court of Appeals of the State of West Virginia. Suit against the auditor of that State to restrain the collection of a tax.

Memphis Co. v. Commissioners, 112 U. S. 609. Error to the Supreme Court of the State of Arkansas. Suit to enjoin Board of Railroad Commissioners from assessing property for taxation.

Railroad Co. v. Loftin, 105 U. S. 258. Error to the Supreme Court of the State of Arkansas. Suit by the Railroad Co. to restrain the collection of taxes.

St. Louis R'y Co. v. Berry, 113 U. S. 471. Error to the Supreme Court of the State of Arkansas. Suit to restrain the Railroad Commissioners of the State from assessing for taxation certain property.

Wilson v. Gaines, 103 U. S. 417. Error to the Supreme Court of the State of Tennessee. Suit to enjoin the collection of taxes on a railroad.

Railway Co. v. Loftin, 98 U. S. 563. Error to the Supreme Court of the State of Arkansas. Suit to enjoin the Collector of Jackson County from collecting certain taxes.

Railroad Co. v. Gaines, 97 U. S. 698. Error to the Supreme Court of the State of Tennessee. Suit by three railroad companies to enjoin officers of the State from assessing and collecting taxes.

Wilmington R. R. v. Reid, Sheriff, 13 Wall. 264. Error to Supreme Court of North Carolina. Suit to enjoin a sheriff from the collection of certain taxes.

Home of the Friendless v. Rouse, 8 Wall. 433. Error to the Supreme Court of Missouri. Suit to enjoin the Collector of Taxes of St. Louis from collecting certain taxes.

Armstrong v. Treasurer of Athens County, 16 Peters, 301. Error to the Supreme Court of Ohio. Suit to enjoin a tax collector from enforcing the payment of a certain tax.

These cases—both those originally instituted in the Circuit Courts of the United States and those originally instituted in the chancery courts of the various States—were all founded upon an allegation that the tax was about to be assessed or levied in violation of a contract between the State and the person or corporation owning the property.

ACTS EXTENDING CHARTER.

An Act to Extend the Charter of the Bank of Louisville, Bank of Kentucky, and Northern Bank. Approved February 15, 1858.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the chartered privileges and rights of the president, directors, and company of the Bank of Louisville shall continue in full force for the period of twenty years from the first day of January, 1863; that the chartered privileges of the president, directors, and company of the Bank of Kentucky shall continue in full force for twenty years from the first day of October, 1864; and that the chartered privileges and rights of the president, directors, and company of the Northern Bank of

Kentucky shall continue in full force for twenty years from the first day of May, 1865. But said extensions of the charters of said banks shall be subject to the restrictions and provisions following, viz:

1. Each of said banks shall be subject to all the restrictions, limitations, penalties, conditions, and duties imposed on them by the respective acts for their incorporations and the acts amendatory thereto.

2. The legislature shall at all times have the power to prohibit the issue of bank notes under the denomination of five dollars, and, after 1875, of notes under the denomination of ten dollars.

3. After the termination of the present charters, and after this act takes effect as to each of said banks, neither of them shall at any time have in circulation a greater amount than the actual capital paid in.

4. In one year from the 1st of June, 1858, the Northern Bank shall establish a branch in the town of Glasgow, in the county of Barren, with a capital of one hundred and fifty thousand dollars. The Bank of Kentucky shall establish a branch at the town of Columbus, in the county of Hickman, with a capital of one hundred and fifty thousand dollars. And the Bank of Louisville shall establish a branch at the town of Burkesville, in Cumberland County, with a capital of one hundred and fifty thousand dollars.

SECTION 2. That said banks shall not invest in bills of exchange more than double the amount of the notes discounted and suspended debt and other investments of said bank bearing six per cent interest, excluding from the computation of bills of exchange the remittances which said bank may make for the collection at points where the funds may accumulate.

SECTION 3. That the stockholders of the several banks aforesaid shall, within one year from the 10th of May, 1858, by a vote of a majority of all the stockholders, given at a stated or called meeting, determine whether they will accept the proposed

extensions. The Governor of this Commonwealth shall have the power, in person or by proxy, to vote the stock of the Commonwealth; and each bank accepting the provisions of this act in the mode aforesaid shall notify the Governor of the Commonwealth of the acceptance by the certificate of the president and directors of such bank; and when notice is thus given this act shall be considered in full force and effect as to such bank.

SECTION 4. That said banks shall issue no bills or bank notes, checks, or orders, to circulate as money, of a less denomination than five dollars; and after 1870 they shall issue no bills or notes, checks, or orders, to circulate as money, of a less denomination than ten dollars; and said banks shall redeem before 1865 all their notes and bills of a less denomination than five dollars, and shall not pay out the same again after that date; and said bank shall redeem before 1870 all their bills and notes of a less denomination than ten dollars, and shall not pay out the same again after that date.

SECTION 5. That no part of the capital of either of said banks shall be used in the purchase of bills or discount of notes beyond the limits of this State; but money received by either of said banks in payment of bills purchased or discounted within this State, and payable at points beyond its limits, may be reinvested out of this State in bills of exchange having not more than ninety days to run; and nothing herein shall be so construed as to prevent either of said banks from receiving any bill or note out of the State in payment or settlement of any bad or doubtful debt.

SECTION 6. That the Bank of Kentucky, the Northern Bank of Kentucky, and the Bank of Louisville shall be and the same are hereby required to pay annually to the commissioners of the sinking fund fifty cents upon each one hundred dollars of the contingent fund now held or may hereafter accrue to said banks over and above the amount now required to be retained by their respective charters.

AN ACT TO AMEND THE CHARTER OF THE BANK OF KENTUCKY. APPROVED FEBRUARY 1, 1872.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the president and directors of the Bank of Kentucky be and they are hereby authorized and empowered to purchase from the commissioners of the sinking fund the stock of said bank owned by the State; and the commissioners of the sinking fund be and are hereby authorized to sell on such terms as may be agreed on with said commissioners.

SECTION 2. That the said president and directors of said bank may cancel the stock so purchased, and may at their pleasure reissue the same in such amounts and on such terms as they may deem proper: *Provided*, That the said bank shall issue no stock except when it has been subscribed for on its books and actually paid in.

SECTION 3. That from and after the purchase of the stock as in this act authorized, the right of the State of Kentucky to appoint or retain directors in said bank shall cease; but the number of directors thereof shall remain nine, as now provided by law, all to be elected by the stockholders of the bank.

SECTION 4. That the said president and directors of said bank may continue, establish, and withdraw its branches, as to them may seem desirable, and increase the capital stock of the bank, but not to exceed three millions of dollars; and may use so much of the capital stock in the city of Louisville as they deem is for the interest of the stockholders: *Provided*, That said bank shall annually, on the first day of January, pay into the treasury, to go into revenue proper, a tax of fifty cents on each share of one hundred dollars of its increased capital stock, which shall be in full of all tax or bonus on such increased capital stock.

SECTION 5. That the charter of the Bank of Kentucky be and the same is hereby extended twenty-five years.

SECTION 6. The president, directors, and company of said bank shall have all the rights, privileges, and franchises granted

to other banks of Kentucky: *Provided*, That nothing in this act shall be so construed as to give to the Bank of Kentucky the privilege to engage in insurance, warehousing, or any other business except a legitimate banking business.

SECTION 7. The directors of the bank may appoint a vice-president thereof, whose powers, duties, and term of service shall be regulated by the by-laws of said bank.

SECTION 8. This act shall take effect from its passage.

SUPREME COURT OF THE UNITED STATES.

SAMUEL H. STONE, AUDITOR, ETC., - - *Appellants,*

No. 356. *VERSUS*

BANK OF KENTUCKY, - - - - - - *Appellee,*

AND

SAMUEL H. STONE, AUDITOR, ETC., - - *Appellants,*

No. 358. *VERSUS*

BANK OF LOUISVILLE, - - - - - *Appellee.*

We beg leave to present a copy of the Act to Extend and Continue the Charter of the Bank of Louisville, approved May 1, 1880.

The first act extending the charter of this bank will be found in our brief for the Bank of Kentucky, at page 101.

And we further present the opinion of the Court of Appeals of Kentucky, delivered March 2, 1899, dismissing the appeal of the City of Frankfort from the judgment rendered by the Franklin Circuit Court, January 21, 1896. (R. No. 356, p. 76.) And from a similar judgment rendered in favor of Farmers Bank of Kentucky, January 21, 1896. (R. No. 385, p. 127.)

ALEX P. HUMPHREY,
GEO. M. DAVIE,
For Appellee.

AN ACT TO EXTEND AND CONTINUE THE CHARTER OF THE BANK OF LOUISVILLE.

Whereas, It is represented to this General Assembly that the charter of the Bank of Louisville will expire and cease on the first day of January, 1883, and in order to remedy and continue and extend the same,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the chartered rights and privileges of the president, directors, and company of the Bank of Louisville shall continue and extend in full force and effect for twenty years from and after the said first day of January, 1883.

Section 2. Said bank, under the continuance and extension hereby granted, shall be subject to the restrictions, limitations, penalties, conditions, and duties, and be entitled to all the rights imposed and granted upon and to it by the act of its incorporation and the acts amendatory to, or relating thereto, now in force; but it may, at any time, sell and dispose of any or all real estate taken by or conveyed to it in payment of any debt or debts due it.

Section 3. Before this act shall go in force or take effect, it must be approved and accepted by a majority in interest of its stockholders at a meeting ordered or called for that purpose by the president and directors of said bank.

Section 4. If it should be so approved and accepted, notice thereof shall be given by the president of said bank to the Governor of said Commonwealth; and, when given, this act shall be considered and held to be in full force and effect.

Approved May 1, 1880.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT V. FARMERS BANK OF KENTUCKY.

SAME v. BANK OF KENTUCKY.

(Court of Appeals of Kentucky, March 2, 1899.)

Time—Method of Computation—Limitation of Appeals—Rehearing of Motion to Dismiss Appeal.

1. Civ. Code Prac. S. 681, providing that "if a certain number of days be required to intervene between two acts, the time of one only of the acts may be counted," does not apply where the computation is to be made from an act done, in which case the day on which the act was done must be included; and therefore an appeal granted January 21, 1898, from a judgment rendered January 21, 1896, is too late, under Civ. Code Prac. S. 745, providing that "an appeal shall not be granted, except within two years next after the right to appeal first accrued."

2. The computation of the two years within which an appeal may be granted must be made from the time at which the appeal might first have been granted by the trial court, and not from the time it might first have been granted by the clerk of the Court of Appeals.

3. The court may grant a rehearing of a motion to dismiss an appeal which has been overruled.

"To be officially reported."

Petition for rehearing. Granted.

For former report, see 47 S. W. 872.

DURELLE, J.

In each of these two cases the judgment appealed from was rendered January 21, 1896, and the appeal was granted by the clerk of the Court of Appeals upon application of appellant, January 21, 1898. In each case the plea of limitation is filed, and motion made to dismiss the appeal, under Section 745 of the

Civil Code of Practice, which provides: "An appeal shall not be granted, except within two years next after the right to appeal first accrued."

In Smith v. Cassity, 9 B. Mon. 192, where the decree was rendered on the 25th day of September, 1845, and the writ of error sued out on the 25th day of September, 1848, it was held that the then existing period of limitation of three years had not expired, the court using the following language:

> "The universal rule of computing time from one day to another is to exclude one and include the other."

But in Chiles v. Smith's Heirs, 13 B. Mon. 460, the final decree was rendered on October 18, 1848, and the writ of error sued out October 18, 1851. The statute was, in language, similar to the existing statute, and provided that no writ of error should be sued out, "except in three years next after the judgment or final decree, and not thereafter." The court, in a very carefully considered opinion by Judge Simpson, in which the then existing authorities were discussed, said:

> "If the day in which the decree is rendered is to be included in the computation of the time, then the three years had expired on the 17th of October, 1851, and the bar was complete when the writ of error was sued out. The rule in regard to the computation of time seems to be that, when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done; but when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded."

But it is urged that Section 681 of the Code of Practice has changed the rule. That section reads as follows:

> "If a certain number of days be required to intervene between two acts, the day of one only of the acts may be counted."

After a careful reconsideration of the question here presented, we are unable to see that the Code section just quoted applies to the question before us. It was intended to apply to cases like the one presented in Fehler v. Gosnell, 35 S. W. 1125, where the statute under construction provided that fourteen days must elapse between the passage of an ordinance by the board of council and by the board of aldermen of the city of Louisville. Moreover, the law embodied in Section 681 appears to have been first adopted in 1854, and to have been continued from that time down to the present, notwithstanding which the rule of construction announced in the case of Chiles v. Smith's Heirs has been repeatedly reaffirmed by this court, down almost to the present day. In Batman v. Megowan, 1 Metc. (Ky.) 544, decided in 1858, the statute required notice of an application to contest the election to be given within ten days after the final action of the board of examiners. They acted on the sixth; and, on the authority of Chiles v. Smith's Heirs, notice given on the sixteenth was held too late. Counsel for appellant called attention to the fact that in that case it was held (page 549) that the part of the statute which directs the sheriff to deposit the poll-books within two days "next" after the election had effect to exclude the day of the election. This, however, was done upon the peculiar phrascology of the statute, the court holding that the two days "next" after the election meant the two next or following days. In Mallory v. Hiles, 4 Metc. (Ky.) 53, decided in 1862, the Chiles Case was referred to with approval. In Long v. Hughes, 1 Duv. 387, decided in 1864, in considering the Section (371) of the Civil Code of Practice which required the application for new trial to be made within three days after the verdict or decision was rendered, it was said, through Judge Williams:

> "Doubtless, the day on which a verdict or judgment is rendered should be computed; for, as said in Chiles v. Smith's Heirs, 13 B. Mon. 460, 'when the computation is to be made from an act done, the day in which the act was done must be included.'"

And this has always been the construction placed upon the provision as to new trials. In White v. Crutcher, 1 Bush, 472, decided in 1866, the rule laid down by Judge Simpson was again applied to Section 371 of the Civil Code of Practice, providing when motions for new trial might be made. In Wood v. Com., 11 Bush, 220, decided in 1875, the rule was again approved; and again in Handley v. Cunningham's Trustee, 12 Bush, 402; and again in Mooar v. Bank, 80 Ky. 308, decided in 1882; and again in Com. v. Shelton, 99 Ky. 120, 35 S. W. 128, decided in 1896. The same question was distinctly decided in Greer v. Spencer, 3 Ky. Law Rep. 469, decided in 1881.

It is urged by counsel that the right to appeal by suing out the appeal in the office of the clerk of this court does not accrue until after the end of the term at which the judgment is rendered. But we are clearly of opinion that the language used was intended to refer to the first accrual of the right of appeal; for the question of whether the appeal can be obtained from the lower court or from the office of the clerk of the court of appeals is one merely of procedure and not of right.

It is further objected that, having once acted upon the motion to dismiss by overruling it, the court should not now reconsider the question (which had been determined by interlocutory order) upon a petition for rehearing. But we are clearly of opinion that the court has power over such orders, within the term; and, so far as that is concerned, the petition for rehearing might be treated as a renewal of the motion. For the reasons given, the former opinion herein is withdrawn, and both appeals are dismissed.

Whole court sitting.

(49 Southwestern Rep. 811.)